# Sunshine Act Meetings

Federal Register
Vol. 54, No. 24
Tuesday, Feburary 7, 1989

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

**FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS**

**TIME AND DATE:** 10:00 a.m., Friday, February 10, 1989.

**PLACE:** Marriners S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:**

*Summary Agenda*

Because of its routine nature, no substantive discussion of the following item is anticipated. This matter will be voted on without discussion unless a member of the Board requests that the item be moved to the discussion agenda.

1. Proposed interpretation of Regulation H (Membership of State Banking Institutions in the Federal Reserve System) regarding investment in mutual funds.

*Discussion Agenda*

2. Proposed revision of the Board's 1980 Community Reinvestment Act Information Statement.

3. Any items carried forward from a previously announced meeting.

**Note.**—This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452-3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, DC 20551.

**CONTACT PERSON FOR MORE INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board; (202)452-3204.

Date: February 3, 1989.

**Jennifer J. Johnson,**

*Associate Secretary of the Board.*

[FR Doc. 89-2925 Filed 2-3-89; 10:36 am]

BILLING CODE 6210-01-M

**FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS.**

**TIME AND DATE:** Approximately 11:00 a.m., Friday, February 10, 1989, following a recess at the conclusion of the open meeting.

**PLACE:** Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:**

1. Issues regarding eligibility criteria for Federal Reserve Bank and Branch directors.

2. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

3. Any items carried forward from a previously announced meeting.

**CONTACT PERSON FOR MORE INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Date: February 3, 1989.

**Jennifer J. Johnson,**

*Associate Secretary of the Board.*

[FR Doc. 89-2926 Filed 2-3-89; 10:38 am]

BILLING CODE 6210-01-M

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

February 2, 1989.

**TIME AND DATE:** 10:00 a.m., Thursday, February 9, 1989.

**PLACE:** Room 600, 1730 K Street, NW., Washington, DC.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The Commission will consider and act upon the following:

1. Possible revisions to present Commission Procedural Rules 59-65, 29 CDR 2700.59-65.

Any person intending to attend this meeting who requries special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

**CONTACT PERSON FOR MORE INFORMATION:** Jean Ellen (202) 653-5629 (202) 566-2673 for TDD Relay.

**Jean H. Ellen,**

*Agenda Clerk.*

[FR Doc. 89-2959 Filed 2-3-89; 3:50 pm]

BILLING CODE 6735-01-M

**NATIONAL LABOR RELATIONS BOARD**

**"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT:** January 31, 1989, Volume 54 FR 4939.

**PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING:** February 7, 1989, 9:30 a.m.

**CHANGE IN THE MEETING:** The open part of the meeting, casehandling procedures is canceled. The date and time of the closed meeting remain unchanged.

**CONTACT PERSON FOR MORE INFORMATION:** John C. Truesdale, Executive Secretary, Washington, DC 20570, Telephone: (202) 254-9430.

Dated, Washington, DC, February 3, 1989.

By direction of the Board.

**John C. Truesdale,**

*Executive Secretary, National Labor Relations Board.*

[FR Doc. 89-2951 Filed 2-3-89; 11:48 am]

BILLING CODE 7545-01-M

**NUCLEAR REGULATORY COMMISSION**

**DATE:** Weeks of February 6, 13, 20, and 27, 1989.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Open and Closed.

**MATTERS TO BE CONSIDERED:**

**Week of February 6**

*Monday, February 6*

2:00 p.m.
Briefing on Status of Peach Bottom (Public Meeting)

*Tuesday, February 7*

2:00 p.m.
Briefing on Final Rule Regarding the High Level Waste Management Licensing Support System (Public Meeting)

*Wednesday, February 8*

10:00 a.m.
Briefing on Final Rule on Fitness for Duty (Public Meeting)

Thursday, February 9

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting):
a. Policy Statement on the Cooperation with States at Commercial Nuclear Power Plants and Other Nuclear Production and Utilization Facilities (Tentative)

*Friday, February 10*

2:00 p.m.
Oral Argument on Sanction Issue in Shoreham Proceedings (Public Meeting)

**Week of February 13 (Tentative)**

*Friday, February 17*

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

**Week of February 20 (Tentative)**

*Tuesday, February 21*

10:00 a.m.
Briefing on Staff Proposal on Continuity of Government Program (Closed—Ex. 1)
2:00 p.m.
Briefing on Final Rule on Early Site Permits; Standard Design Certification; and Combined Licenses for Nuclear Power Reactors (Public Meeting)

*Wednesday, February 22*

10:00 a.m.
Briefing on Status of West Valley Project (Public Meeting)

*Thursday, February 23*

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

**Week of February 27 (Tentative)**

*Monday, February 27*

10:00 a.m.
Briefing on the Status of NUREG–1150 (Public Meeting)
2:00 p.m.
Briefing on Final Report on BWR Mark I Containment Issues (Public Meeting)

*Wednesday, March 1*

9:30 a.m.
Briefing on Report on Maintenance Performance Indicator Development (Public Meeting)

*Thursday, March 2*

10:00 a.m.
Briefing on Importing and Exporting of Radioactive Waste (Public Meeting)
11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Note.—Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

To Verify the Status of Meetings Call (Recording)—(301) 492–0292.

**CONTACT PERSON FOR MORE INFORMATION:** William Hill, (301) 492–1661.

**William M. Hill, Jr.,**

*Office of the Secretary.*

**February 2, 1989.**

[FR Doc. 89–2971 Filed 2–3–89; 3:06 pm]

**BILLING CODE 7590–01–M**

# Corrections

Federal Register
Vol. 54, No. 24
Tuesday, February 7, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

## ENVIRONMENTAL PROTECTION AGENCY

**[OPTS-41030; FRL-3476-6]**

### Twenty-Third Report of the Interagency Testing Committee to the Administrator; Receipt of Report and Request for Comments Regarding Priority List of Chemicals

*Correction*

In notice document 88-26306 beginning on page 46262 in the issue of Wednesday, November 16, 1988, make the following corrections:

1. On page 46265, in the second column, in the table, in item 9, at the end of the third line, insert "hydroxy-,".

2. On the same page, in the same column, in the table, in item 12, in the fourth line, insert a hyphen before "hydroxy-".

3. On the same page, in the same column, in the table, in item 13, in the fourth line, insert a hyphen before "hydroxy"; and at the end of the fifth line, remove "D".

4. On page 46266, in the second column of the table, the second entry (corresponding to "Empirical Formula") should read "$C_6H_{12}C1_3O_4P$".

5. On the same page, in the first column, in the last line, before "and" insert "automobiles, buildings, etc. are scrapped and disposed of in dumps".

BILLING CODE 1505-01-D

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Parts 50 and 56

**[Docket No. 87N-0032]**

### Protection of Human Subjects; Informed Consent; Standards for Institutional Review Boards for Clinical Investigations

*Correction*

In proposed rule document 88-25553 beginning on page 45678 in the issue of Thursday, November 10, 1988, make the following corrections:

1. On page 45680, in the second column, in the last line, "§ 2.110(b)" should read "§ ———.110(b)".

2. On page 45681, in the 3rd column, under **PART 56—INSTITUTIONAL REVIEW BOARDS**, in the authority citation, in the 12th line, after "381)" insert a comma; and in the 15th line, "263-263n" should read "263b-263n".

BILLING CODE 1505-01-D

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Parts 53 and 56

**[EE-154-78]**

### Lobbying by Public Charities; Lobbying by Private Foundations

*Correction*

In proposed rule document 88-29304 beginning on page 51826 in the issue of Friday, December 23, 1988, make the following corrections:

**§ 53.4945-2 [Corrected]**

1. On page 51834, in the second column, in § 53.4945-2(d)(1)(vii), in *Example (4)*, the first line should read "*Example (4)*. P publishes a bi-monthly".

2. In § 53.4945-2(d)(1)(vii), in *Example 10*, on page 51835, in the 1st column, in the 10th line, "§ 53.4945-2(d)(v)" should read "§ 53.4945-2(d)(1)(v)".

3. On page 51835, in the first column, in § 53.4945-2(d)(4), in the 12th line, after "lobbying" insert "and are thus taxable expenditures under section 4945".

**§ 56.4911-2 [Corrected]**

4. On page 51836, in the first column, § 56.4911-2(b)(2)(ii)(C) and the closing text of paragraph (b) should read as follows:

(C) Encourages the recipient of the communication to take action with respect to such legislation.

(For special rules regarding certain mass media communications, see § 56.4911-2(b)(5)).

5. On page 51838, in the 2nd column, in § 56.4911-2(b)(4)(ii)(C), in *Example (5)*, in the 15th line, "in" should read "is".

6. On page 51840, in the 3rd column, in § 56.4911-2(c)(1)(vii), in *Example (5)*, in the 25th line, "written" should read "within".

7. On page 51841, in the first column, in § 56.4911-2(c)(1)(vii), in *Example (10)*, in the second line, "conduct to" should read "conduct a".

8. On the same page, in the second column, in § 56.4911-2(c)(2), in the fourth line, "board" should read "broad".

**§ 56.4911-3 [Corrected]**

9. On page 51843, in the second column, in § 56.4911-3(b), in *Example (6)*, in the last line, "§ 56.491-3(a)(2)(ii)" should read "§ 56.4911-3(a)(2)(ii)".

BILLING CODE 1505-01-D

Federal Register

Tuesday
February 7, 1989

Part II

# Department of Energy

Office of Conservation and Renewable Energy

10 CFR Part 430

Energy Conservation Program for Consumer Products: Final Rulemaking Regarding Regulations Related to Energy Conservation Standards for Consumer Products; Final Rule

DEPARTMENT OF ENERGY

Office of Conservation and Renewable Energy

10 CFR Part 430

[Docket No. CAS-RM-78-110]

# Energy Conservation Program for Consumer Products: Final Rulemaking Regarding Regulations Related to Energy Conservation Standards for Consumer Products

**AGENCY:** Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Energy Policy and Conservation Act, as amended by the National Energy Conservation Policy Act, the National Appliance Energy Conservation Act of 1987, and the National Appliance Energy Conservation Amendments of 1988, prescribes energy conservation standards for certain types of consumer products. As a general matter, these Federal standards preempt State and local standards and any other State and local requirements with respect to energy efficiency or energy use of these products.

The Department of Energy today is issuing a final rule amending Title 10, Part 430 of the Code of Federal Regulations to include procedures for petitions that may be made by States and manufacturers with regard to Federal preemption of State and local energy conservation standards.

The rule also adds procedures by which certain small businesses may obtain exemptions from the standards and sets forth procedures for certification and enforcement of the standards. Today's action also includes the following: Clarification of the basis for calculating the heating seasonal performance factor energy conservation standard prescribed by the Energy Policy and Conservation Act, as amended, for central air conditioners and heat pumps; an annual energy use measure for refrigerators, refrigerator-freezers and freezers; and test procedure and sampling requirements for pool heaters.

**EFFECTIVE DATE:** March 9, 1989.

**FOR FURTHER INFORMATION CONTACT:**

Michael J. McCabe, U.S. Department of Energy, Office of Conservation and Renewable Energy, Forrestal Building Mail Station, CE-132, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-9127.

Eugene Margolis, Esq., U.S. Department of Energy, Office of General Counsel, Forrestal Building Mail Station, GC-12, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-9507.

**SUPPLEMENTARY INFORMATION:**



## I. Introduction

### *a. Authority*

Part B of Title III of the Energy Policy and Conservation Act (EPCA), Pub. L. 94-163, as amended by the National Energy Conservation Policy Act (NECPA), Pub. L. 96-619, by the National Appliance Energy Conservation Act of 1987 (NAECA), Pub. L. 100-12, and by the National Appliance Energy Conservation Amendments of 1988 (NAECA 1988), Pub. L. 100-357,[1] created the Energy Conservation Program for Consumer Products other than Automobiles. The consumer products subject to this program (often referred to hereafter as "covered products") are: Refrigerators, refrigerator-freezers and freezers; dishwashers; clothes dryers; water heaters; central air conditioners and central air conditioning heat pumps; furnaces; direct heating equipment; television sets; kitchen ranges and ovens; clothes washers; room air conditioners; pool heaters; and fluorescent lamp ballasts; as well as any other consumer product classified by the Secretary of Energy. See section 322. To date, the Secretary has not so classified any additional products.

Under the Act, the program consists essentially of three parts: testing, labeling, and mandatory minimum energy conservation standards. The Department of Energy (DOE or Department), in consultation with the National Bureau of Standards, is required to amend or establish new test procedures, as appropriate, for each of the covered products. Section 323. The purpose of the test procedures is to provide for test results that reflect the energy efficiency, energy use, or estimated annual operating costs of each of the covered products. Section 323(b)(3). A test procedure is not required if DOE determines by rule that one cannot be developed. Section 323(d)(1). One hundred and eighty days after a test procedure for a product is adopted, no manufacturer may represent the energy consumption of, or the cost of energy consumed by the product except as reflected in a test conducted according to the DOE procedure. Section 323(c)(2).

The Federal Trade Commission (FTC) is required by the Act to prescribe rules governing the labeling of covered products for which test procedures have been prescribed by DOE. Section 324(a). These rules are to require that each particular model of a covered product bear a label that indicates its annual operating cost and the range of estimated annual operating costs for other models of that product. Section 324(c)(1). Disclosure of estimated operating cost is not required under section 324 if the FTC determines that such disclosure is not likely to assist consumers in making purchasing decisions or is not economically feasible. In such a case, FTC must require a different useful measure of energy consumption. Section 324(c). At the present time there is an FTC rule requiring labels under the Act for the following products: Room air conditioners, furnaces, clothes washers, dishwashers, water heaters, freezers, and refrigerators and refrigerator-freezers. 44 FR 66475, November 19, 1979. On December 10, 1987, FTC published a rule requiring labels for central air conditioners. 52 FR 46888.

For twelve of the covered products, the Act prescribes Federal energy conservation standards. Section 325 (a)(1) and (b) through (h). The Act establishes initial effective dates for the standards in 1988, 1990, 1992 or 1993, depending on the product and specifies that the standards are to be reviewed by the Department within three to ten years, also depending on the product. Section 325 (b) through (h). After the specified three- to ten-year period, DOE may promulgate new standards for each product, but such standards may not be less stringent than those initially established by the Act. Section 325 (l)(1).

The Act also directs DOE to prescribe an energy conservation standard no later than January 1, 1989, for small gas furnaces, i.e., gas furnaces having an input of less than 45,000 Btu per hour

[1] Part B of Title III of EPCA as amended by NECPA, NAECA, and NAECA 1988 is referred to in this notice as the "Act." Part B of Title III is codified at 42 U.S.C. 6291 *et seq.* Part B of Title III of EPCA as amended by NECPA only, is referred to in this notice as NECPA.

and manufactured on or after January 1, 1992. Section 325(f)(1)(B).

With regard to another covered product, television sets, the Act allows the Department to prescribe an applicable standard; however, such standard may not become effective before January 1, 1992. Section 325(i)(3).

The Act also permits the Department to prescribe standards for any other type of consumer product, that using certain criteria, DOE may classify as a covered product. Section 325(i); (1) and (m). Any new or amended standard is required to be designed so as to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. Section 325(1)(2)(A).

Section 325(1)(2)(B)(i) provides that before DOE determines whether a standard is economically justified, it must first solicit views and comments on a proposed standard. After reviewing comments on the proposal, DOE must then determine that the benefits of the standard exceed its burdens, based, to the greatest extent practicable, by considering:

(1) The economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard;

(3) The total projected amount of energy savings likely to result directly from the imposition of the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;

(5) The impact of any lessening of competition, determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

(6) The Nation's need to conserve energy; and

(7) Other factors the Secretary considers relevant. In addition, the Act specifies criteria for petitions to DOE in regard to amendments to standards. Section 325(k). Under the Act, any person may petition the Department to conduct a rulemaking to amend a Federal energy conservation standard for any covered product. Section 325(k)(1). The Department must grant such a petition if it determines that an amended standard will result in significant conservation of energy, is technologically feasible and is cost-effective. Section 325(k)(2). Section 325(k)(3) (A) and (B) stipulates that in no case may an amended standard apply to products manufactured within three years or five years, depending on the product, after publication of the final rule establishing a standard. Today's final rule does not include procedures and criteria for petitions for an amended standard. Since 1990 is the earliest date by which an amended standard could apply, DOE will address this issue in a future rulemaking proceeding.

Section 325(q) provides that manufacturers having annual gross revenues not exceeding $8 million may apply to DOE for an exemption from all or part of the requirements of an energy conservation standard. This exemption may not extend beyond two years from the effective date of any standard's requirement. This authority will not be exercised by DOE unless, after written consultation with the Attorney General, the Secretary finds that failure to allow the exemption would likely result in a lessening of competition.

Section 326 of the Act authorizes the Secretary to impose requirements upon manufacturers to submit information or reports to assure that each covered product to which a standard applies meets the required energy efficiency level. Today's rule establishes certification provisions that include testing by the manufacturer and submission of compliance and certification data to DOE. The Act also specifies that in determining information requirements, DOE consider existing sources of information, including nationally recognized trade association certification programs. Section 326(d).

Enforcement-related provisions of the Act provide for: (1) DOE to prescribe rules requiring manufacturers to allow the Department to observe testing and inspect results of testing conducted by the manufacturer (section 326(b)(5)); (2) manufacturers to supply to DOE a reasonable number of products for testing purposes (section 326(b)(3)); (3) manufacturers to submit information or reports necessary to ensure compliance (section 326(d)); and (4) injunctive relief against any prohibited act, including distribution of noncomplying products (section 334).

Section 327 of the Act addresses the effect of Federal rules concerning testing, labeling, and standards on State laws or regulations concerning such matters. Generally, all such State laws or regulations are superseded by the Act. Section 327 (a) through (c). Exceptions to this general rule include: (1) State standards prescribed or enacted before January 3, 1987, and applicable to products before January 3, 1988, may remain in effect until the applicable standard begins (section 327(b)(1)); (2) state procurement standards which are more stringent than the applicable Federal standard may remain in effect (section 327(b)(2) and (e)); and certain building code requirements for new construction may remain in effect until the applicable standards begin, and, if certain criteria are met, the codes are exempt from Federal preemption (section 327(b)(3) and (f)(1) through (f)(4)); state regulations banning constant burning pilot lights in pool heaters are exempt from Federal preemption (section 372(b)(4)); and State standards for television sets effective on or after January 1, 1992, may remain in effect in the absence of a Federal standard for such product (section 327(b)(6)).

Another exception to Federal preemption concerns standards for refrigerators, refrigerator-freezers and freezers. The Act specifies that if DOE does not publish a final rule before January 1, 1990, relating to the revision of Federal standards for this product category, the standards for these products that have been promulgated by the State of California, and are to be effective January 1, 1992, may become effective beginning January 1, 1993, and may not be preempted by any Federal standard prescribed on or after January 1, 1990. Section 325(b)(3)(A)(ii)(I) and section 327(c).

In addition, if DOE does not publish a final rule before January 1, 1992, relating to the revision of standards for refrigerators, refrigerator-freezers and freezers, any State regulation which applies to such products manufactured on or after January 1, 1995, is exempt from Federal preemption until the effective date of a Federal standard. Section 325(b)(A)(ii)(II).

A State whose energy conservation standard is preempted may petition the Department for a rule that it not be preempted on the basis that the State regulation is needed to meet unusual and compelling State or local energy interests. Section 327(d). However, DOE cannot issue the requested rule if it is established that such State regulation will significantly burden marketing, manufacturing, distribution, sale or servicing of the covered products, or is likely to result in the unavailability in the State of any covered product with performance characteristics that are substantially the same as those generally available in the State at the time of DOE's determination. Section 327(d)(4).

The Act further provides that, except under certain energy emergency

conditions, any State regulation for which exemption is granted shall apply to products manufactured three years after DOE publishes such a rule in the **Federal Register**, or five years after publication, if DOE finds that additional time is necessary for retooling and redesign. Section 327(d)(5).

*b. Background*

NECPA required DOE to establish mandatory energy efficiency standards for each of 13 coverage products.[2] These standards were to be designed to achieve the maximum improvement in energy efficiency that was technologically feasible and economically justified.

NECPA provided, however, that no standard for a product be estasblished if there were no test procedure for the product, or if DOE determined by rule either that a standard would not result in significant conservation of energy, or that a standard was not technologically feasible or economically justified. In determining whether a standard was economically justified, the Department was directed to determine whether the benefits of the standard exceeded its burdens by weighing the seven factors discussed above.

NECPA specified the priorities and procedures to be followed in adopting efficiency standards. Nine of the 13 covered products were given priority. These nine products were: Refrigerators and refrigerator-freezers, freezers, clothes dryers, water heaters, room air conditioners, home heating equipment not including furnaces, kitchen ranges and ovens, central air conditioners, and furnaces.

On June 30, 1980, DOE set forth its first proposed rulemaking for the nine products. 45 FR 43976. (Hereafter referred to as the June 1980 proposal). It also proposed comprehensive requirements for certification and enforcement of the standards as well as criteria and procedures for petitions from small businesses seeking temporary exemption from standards and by States seeking exemption for regulations subject to the general preemption requirements of NECPA.

On April 2, 1982, DOE published a further notice of proposed rulemaking with respect to the nine priority products. 47 FR 14424. (Hereafter referred to as the April 1982 proposal). Among other things, the April 1982 proposal included rules governing petitions to DOE both by States to obtain exemption from preemption of State or local energy efficiency standards, as well as by manufacturers to obtain preemption of State or local standards.

On December 22, 1982, DOE published a final rule that efficiency standards were not warranted for two covered products (clothes dryers and kitchen ranges and ovens) and that also prescribed final procedures by which States might obtain exemption for State or local efficiency standards from Federal preemption, and by which manufacturers might obtain preemption of a State or local standard not otherwise preempted. 47 FR 57198. (Hereafter referred to as the December 1982 final rule).

On August 30, 1983, DOE published a final rule with respect to six additional covered products: Refrigerators and refrigerator-freezers, freezers, water heaters, furnaces, room air conditioners and central air conditioners. 48 FR 39376. (Hereafter referred to as the August 1983 final rule). For each of the six products covered by the August 1983 final rule, except central air conditioners, DOE determined that an energy efficiency standard would not result in significant conservation of energy and would not be economically justified. With respect to central air conditioners, DOE found that an energy efficiency standard would result in significant conservation of energy, but would not be economically justified.

On April 1, 1985, DOE published a proposed rule with respect to four covered products: Dishwashers, television sets, clothes washers and humidifiers and dehumidifiers. 50 FR 12966. (Hereafter referred to as the 1985 proposal.) For each of the four products covered by the 1985 proposal, DOE proposed that an energy efficiency standard would not be economically justified and would not result in a significant conservation of energy.

During 1983, DOE's December 1982 and August 1983 final rules were challenged in a lawsuit brought by the Natural Resources Defense Council (NRDC) and others against the Department. On July 16, 1985, the U.S. Court of Appeals for the District of Columbia Circuit set aside DOE's December 1982 and August 1983 final rules. *NRDC* v. *Herrington*, 768 F.2d 1355 (DC Cir. 1985).

Consequently, on March 5, 1986, DOE published notices in the **Federal Register** removing the December 1982 and August 1983 final rules and withdrawing the 1985 proposal. 51 FR 7549 and 51 FR 7582.

As required by NAECA, which was enacted on March 17, 1987, and which established energy conservation standards for certain appliances, DOE published an advance notice of proposed relemaking regarding amended standards for refrigerators, refrigerator-freezers, and freezers and regarding establishing standards for small gas furnaces and television sets. 52 FR 46367, December 7, 1987. (Hereafter referred to as the December 1987 advance notice.) The December 1987 advance notice presented the product classes and analytical methodology for DOE's analysis in the rulemaking for these three products. The Department published a notice of proposed rulemaking on December 2, 1988, proposing to increase the standard level for refrigerators, refrigerator-freezers, and freezers; to establish a standard of 78 percent AFUE for small gas furnaces and to determine that no standard be established at this time for television sets. 53 FR 48798.

On March 4, 1988, the Department published a notice of proposed rulemaking concerning regulations implementing certain provisions of NAECA. 53 FR 7110. (Hereafter referred to as the March 1988 proposal.) In response to the March 1988 proposal, four trade associations representing appliance manufacturers testified at the public hearing held on April 12, 1988, and during the comment period ending May 3, 1988, DOE received nine written comments from manufacturers, trade associations and State governments. The issues raised in the Testimony and written comments are addressed in section II of this notice. Today's final rule responds to the comments received on the March 1988 proposal.

On March 15, 1988, the President signed Executive Order 12630 (53 FR 8859, March 18, 1988) directing that agencies review proposed regulations to avoid unnecessary taking of private property and to assist agencies in accounting for taking private property necessitated by statutory mandate.

The Executive Order states:

"Policies that have takings implications" refer to Federal regulations, proposed Federal legislation, comments on proposed Federal legislation or other Federal policy statements, that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property.

[2] The consumer products covered by NECPA included: Refrigerators and refrigerator-freezers; freezers; dishwashers; clothes dryers; water heaters; room air conditioners; home heating equipment not including furnaces; television sets; kitchen ranges and ovens; clothes waters; humidifiers and dehumidifiers; central air conditioners; and furnaces.

Since the Executive Order was issued after the March 1988 proposal, the proposal did not include a section on this requirement. The Department has conducted such an assessment of today's rule and has concluded that these regulations do not constitute a taking of private property. A discussion of this assessment appears in section III of this notice.

Today's notice also addresses Executive Order 12612, "Federalism". Executive Order 12612 requires that regulations or rules be reviewed for any substantial direct effects on States, on the relationship between the National government and the States, or on the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects, then Executive Order 12612 requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a regulation or a rule.

## II. Discussion of Comments

There was general agreement among the comments that DOE's March 1988 proposal was clear, workable and equitable. Comments recommending changes and requests for clarification focused primarily on certification and enforcement and preemption of State regulations. The comments also included questions and suggestions concerning certain definitions in the March 1988 proposal. The following discussion addresses these comments.[3]

### *a. General Provisions*

The 1987 NAECA amendments NECPA included several definitions of terms which also are defined in 10 CFR Part 430. However, some of the definitions contained in the Act are inconsistent with those previously adopted by DOE regulation. Therefore, DOE is amending 10 CFR Part 430 by adopting the definitions contained in the Act. Since these definitions were established by law and are not subject to revision, they were not included in the March 1988 proposal. However, the preamble to the March 1988 proposal did include a list of these terms and definitions. The terms included in today's final rule are "energy conservation standard," "furnace," and "water heater."

The American Gas Association (AGA) commented that it sees no need for DOE to adopt the term "energy conservation standard" in place of "energy efficiency standard." (AGA, No. 2200, at 3). As stated in the preamble to the March 1988 proposal and above in today's notice, DOE is adopting this and other definitions established by the Act.

Similarly, the NAECA amendments included terms which are not found currently in § 430.2 of 10 CFR Part 430. DOE today is adopting the legislated definitions. The terms are: "Annual fuel utilization efficiency," "pool heater," and "weatherized warm air furnace or boiler." Likewise the NAECA 1988 Amendments included terms which are not found in § 430.2 of 10 CFR Part 430. DOE today is also adopting those legislated definitions. The terms are: "Fluorescent lamp ballast" and "ballast efficacy factor." Also, in regard to test procedures, DOE is adopting the following legislated terms in a new Appendix (Q) to Subpart B of Part 430: "F40T12 lamp," "F96T12 lamp," "F96T12HO lamp," "input current," "luminaire," "ballast input voltage," "nominal lamp watts," "power factor," "power input," "relative light output," and "residential building."

As noted in the March 1988 proposal, annual fuel utilization efficiency (AFUE) is determined in accordance with § 4.6 of Appendix N to Subpart B of Part 430. Because the current provisions for determining AFUE are not consistent with the legislated definition, DOE proposed and, today, is adopting amendments to § 4.6 of Appendix N which conform to the NAECA amendments.

The Hydronics Institute commented that the expression (1 + 0.7), in the denominator of the equation should be (1 + $\alpha$, stating that modulating units, being rated at each design heating requirement, will have varying values of $\alpha$ (Alpha). (Hydronics Institute, Testimony). The Hydronics Institute's suggested change may be a technical improvement to the test procedure, but it is not pertinent to the substance of this rulemaking. It is not DOE's intent to address test procedure issues in today's notice.

The March 1988 proposal stated that the measure of AFUE is based on the assumption that weatherized furnaces and boilers are located out-of-doors; that non-weatherized furnaces are located indoors and all combustion and ventilation air is admitted through grills or ducts from the outdoors and does not communicate with the air in the conditioned space; and that non-weatherized boilers are located indoors. These amendments will likely result in many non-weatherized (indoor) furnaces being rerated to reflect isolated combustion system values. The Hydronics Institute also questioned whether the weatherized furnaces and boilers have to meet 78 and 80 percent AFUE, respectively, when calculated as outdoor units in accordance with the DOE test procedures, or must the weatherized units meet 78 and 80 percent AFUE when calculated as indoor units. (Hydronics Institute, Testimony). The Department believes the language in the Act and the March 1988 proposal is clear, specifying an outdoor unit.

Two comments addressed the proposed definition for packaged terminal heat pump. The Air Conditioning and Refrigeration Institute (ARI) suggested that DOE adopt ARI's definition, which states that the unit "should" have other supplementary heat sources, rather than "may" have supplementary heating available as proposed by DOE. (ARI, No. 2197, at 2). The AGA stressed that the existing definition for packaged terminal air conditioner restricts the use of gas as a heating energy source, even though units utilizing gas are available commercially. AGA stated that to adopt this definition as the basis for the definition of packaged terminal heat pump would further restrict the use of gas as an acceptable source of heating energy. (AGA, No. 2200, at 3).

The Department accepts ARI's point that the suggested word change implies a preference or good practice. Likewise, DOE agrees with AGA that the current definition for packaged terminal air conditioner and the proposed definition for packaged terminal heat pump exclude the use of gas as an available energy source. Today's notice reflects these recommendations.

The International Environmental Corporation (IEC), a manufacturer of hydronic and direct expansion fan coil units, requested clarification on the number of units comprising a "collection" since the definition of "batch" in the March 1988 proposal states that it is a collection of production units of a basic model from which a batch sample is selected. (IEC, No. 2195, at 1). A "collection" means all units in a manufacturer's possession of a single production run of a basic model.

The Department also received comments concerning test procedures and units to be tested. The Association of Home Appliance Manufacturers (AHAM) and Whirlpool Corporation (Whirlpool) were concerned that DOE has not stated clearly that compliance with any standard established by the Act is based on the mean energy value for a basic model rather than on each

[3] Comments on the March 1988 proposal were assigned docket numbers and are numbered consecutively, beginning with No. 2194. Comments presented at the April 12, 1988, public hearing are identified as Testimony.

individual unit. (AHAM, No. 2198, at 2–3, and Whirlpool, No. 2194, at 1).

The Department sees no reason to address this issue in today's rule since the test procedures already establish the requirement as being basic model-specific. As such, each test procedure already includes the method for determining the applicable energy descriptor. Therefore, in order for a manufacturer to certify compliance with a standard, the energy value calculated in accordance with the sampling provisions in § 430.23 must meet or exceed the standard. These provisions are based on mean and adjusted mean values.

AHAM also suggested that DOE amend § 430.23 so that it applies clearly to the energy conservation standards in section 325 of the Act. (AHAM, No. 2198, at 3).

In response to AHAM's suggestion, the Department today is amending the language in the first paragraph of § 430.23.

The National Electrical Manufacturers Association (NEMA) commented on the March 1988 proposal in anticipation of fluorescent lighting fixtures becoming a covered product.[4] NEMA urged DOE to determine that test procedures for fluorescent lamp ballasts are not required under section 323(d)(1) of the Act. (NEMA, No. 2202, at 2–3).

The Department rejects NEMA's reasoning. DOE can make a finding under section 323(d)(1) of the Act only if test procedures cannot be developed which meet the requirements of section 323(b)(3). That subsection states that "Any test procedure * * * shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a product * * * and shall not be unduly burdensome to conduct." Congress recognized and the legislation specifies a test procedure which meets the requirements of section 323(b)(3) of the Act. That test procedure is ANSI C82.2–1984, The American National Standard for Fluorescent Lamp Ballasts Methods of Measurement.

NEMA also requested that DOE include in today's rule several definitions contained in the 1988 Amendments. These terms include, *inter alia*, "fluorescent lamp ballast," "ballast efficacy factor," "fluorescent lamp," "luminaire." NEMA also urged DOE to conduct a new rulemaking to ensure that fluorescent lighting fixtures are addressed adequately in the regulations. (NEMA, No. 2202, at 10).

[4] The 1988 Amendments were pending before Congress during the comment period for this rulemaking.

The 1988 Amendments were not included in the Act until after the March 1988 proposal, so DOE did not address fluorescent lighting fixtures in the March 1988 proposal. However, the Department considers it appropriate to include this covered product in today's final rule, since it was discussed in comments received on the March 1988 proposal. Therefore, DOE is adopting the legislated definitions, and standards contained in the NAECA 1988 amendments. The Department will address additional regulations, as needed, in a separate rulemaking dealing with fluorescent lamp ballasts.

As stated above, and in the March 1988 proposal, the Act establishes standards for 12 types of appliances. Since these standards are established by law, they are being adopted today without comment.

The California Energy Commission (CEC) commented on the classes established for the covered products, in particular for refrigerators. The CEC pointed out that there is no class assigned for refrigerators with automatic defrost or for refrigerator-freezers with automatic defrost and internally mounted freezers. (CEC, No. 2201, at A–1). Since this relates and was the subject of comment to the December 1987 advance notice, DOE's review and determination of these options will be included in the refrigerator rulemaking mentioned above.

CEC also suggested that DOE revise the standard for water heaters so that the formulas used to determine the energy factor are based on actual measured volume instead of rated volume. CEC also requested DOE to include a definition of the term "rated storage volume." (CEC, No. 2201, at A–2).

Today's final rule addresses the implementation of major provisions of the Act. Since CEC's comment actually relates to test procedure issues, DOE will include this in a pending rulemaking concerning amendments to the test procedures for water heaters.

*b. Petitions To Exempt State Regulation From Preemption*

The Department received several comments concerning the criteria and procedures by which States may petition DOE for exemption from preemption.

NEMA opposed DOE's proposed amendments altogether, stating that the Department's action will allow States to petition for exemption from Federal preemption. NEMA added that it cannot envision any unusual or compelling interest to justify DOE granting a State's petition. (NEMA, No. 2202, at 10).

NEMA is incorrect in its understanding of the Act and of DOE's March 1988 proposal. It is the statute, not the Department's regulations, that permits States to petition DOE for such exemptions. Section 327(d)(1)(A) of the Act provides that:

> Any State with a State regulation which provides for any energy conservation standard * * * with respect to energy use or energy efficiency for any * * * covered product for which there is a Federal * * * standard * * * may file a petition with the Secretary requesting a rule that such State regulation become effective. * * *

Section 327 of the Act also establishes DOE's responsibilities for considering such petitions and requires that a State petition established by a preponderance of evidence that such regulation is needed to meet unusual and compelling State and local interests.

Whirlpool and AHAM urged DOE to emphasize that the Department may not grant a State petition if evidence shows that the rule will result in the unavailability in the State of any covered product (or class) of performance characteristics * * * that are substantially the same as those generally available in the State at the time of the Secretary's finding." (Whirlpool, No. 2194, at 3, and AHAM, No. 2198, at 14).

This criterion is prescribed in section 327(d)(4) of the Act with regard to State petitions. A similar provision, regarding new or amended standards, is contained in section 325(l)(4) of the Act. Whirlpool and AHAM believe that both these provisions should be included in today's rule. The provision established in section 327(d)(4) of the Act pertaining to State petitions appeared in § 430.41 of the March 1988 proposal and, likewise, is included in today's final rule. Today's action, however, is not a standards' rulemaking, therefore, section 325(l)(4) of the Act does not apply to the regulations contained in this notice.

The Gas Appliance Manufacturers Association (GAMA) argued that the Department misinterpreted section 327(d)(5) of the Act. GAMA contends that no rule granting a State's petition may permit a State regulation to become effective earlier than three years from the date such a rule is published in the Federal Register. GAMA's understanding of the Act is that there are no exceptions to this provision. Therefore, in the case of an energy emergency condition, DOE may allow a State to implement its regulation before the earliest possible effective date for the revision of the applicable standard, but in no case may a State regulation become effective before three years

from the date DOE grants the petition. (GAMA, No. 2196, at 6.)

The Department rejects GAMA's argument. There is nothing in the Act prescribing or suggesting that the requirements of section 327(d)(5)(A) dictate the terms of a finding that an energy emergency condition exists within a State. If a State has established that such a condition exists, GAMA's interpretation would negate the remedy provided by section 327(d)(5)(B) of the Act. The March 1988 proposal and today's final rule recognize this remedy. Therefore, a rule exempting a State standard from Federal preemption will be effective upon publication in the Federal Register if DOE determines and publishes such determination in the Federal Register that such rule is needed to meet an energy emergency condition existing within the State.

Several comments maintained that DOE did not provide adequate guidance and criteria concerning the content of State petitions.

AHAM stated that the Department should emphasize that the Act does not favor exemptions and that DOE intends to scrutinize petitions to ensure that the intent of the waiver criteria is met. (AHAM, No. 2198, at 2 and 11.) In addition, Whirlpool and AHAM urged DOE to emphasize that the criteria under NAECA are significantly more difficult to satisfy than those prescribed by NECPA. (Whirlpool, No. 2194, at 2–3 and AHAM, No. 2198, at 2.)

These comments suggest, if not assert, that the Act discourages states from seeking a rule to exempt a State standard. The Act establishes general rules of preemption and allows for the waiver of Federal preemption, prescribing the conditions under which DOE may or may not grant a petition. While the grounds for the waiver may be argued to be more stringent than formerly, they need be established by the State only by a "preponderance of the evidence." DOE will examine each petition for adherence to the actual requirements of the Act and DOE's regulations.

Pursuant to NECPA, the Department, in considering a State petition, was required to determine that there was a significant State or local interest to justify a State standard and that such a standard was more stringent than the applicable Federal standard. NECPA prohibited DOE from granting a petition, however, if it determined that a State standard would unduly burden interstate commerce. NECPA did not require a State to prove a negative prediction, i.e., that its standard would not impose an undue burden on interstate commerce. The Department's regulations required a petitioner to describe the significant State or local interest justifying the State standard and any other information the State considered relevant or the Department required.

The Act, as amended by NAECA, requires DOE to grant a State petition if certain criteria are satisfied, though, these criteria are different. DOE must grant a State's petition if it finds that the State has established, by a preponderance of the evidence, that such a standard is needed to meet unusual and compelling State or local energy interests. This term, as defined by the Act, includes factors to establish the difference, in nature and magnitude, between the State's interests and those prevailing in the U.S. generally, and the costs and benefits resulting from the State regulation that would make it preferable or necessary when compared to the costs and benefits of alternative approaches to energy savings or production. The Act also requires DOE to evaluate the State's claim of unusual and compelling State or local interests within the context of the State's energy plan and forecast.

The Act prohibits the Department from granting a petition if it finds that interested persons have established, by a preponderance of the evidence, that the State standard will significantly burden manufacturing, marketing, distribution, sales, or servicing of the covered product on a national basis. The Department must evaluate all factors, including the impact on manufacturing and distribution costs and on small businesses; the extent to which the standard would cause a burden to manufacturers; and the extent to which the State regulation is likely to contribute significantly to a proliferation of State standards. The Department also may not grant a petition if interested persons have established by a preponderance of the evidence, that the State standard is likely to result in the unavailability in the State of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities and volumes that are substantially the same as those generally available at the time of DOE's finding.

It is important to note that pursuant to the Act, as amended by NAECA, again, a State is not required to prove a negative prediction, i.e., that a State standard will not significantly burden manufacturing, marketing, etc., or that a standard will not likely result in the unavailability in the State of any covered product type, etc.

The Department's regulations, as contained in today's notice, require a petition to include a copy of the State's energy plan and forecast, and any other information the petitioner believes is pertinent or the Department may require.

In addition to comparing the requirements for State petitions under NECPA and NAECA, DOE believes the above discussion responds to the New York State Energy Office (NYSEO) request that DOE clarify "burden of proof" requirements for petitioners and interested persons (those submitting comments on petitions). (NYSEO, No. 2199, at 2).

On a related issue, GAMA urged DOE to be explicit, through examples or requirements, that the burden of proof on States to justify exemption is very high. (GAMA, No. 2196, at 5–6). The California Energy Commission (CEC) also encouraged DOE to specify, through regulation, what type of information DOE expects in petitions. (CEC, No. 2201, at 10).

In addition, AHAM and Whirlpool stated that among other things, DOE should require each petition to provide the basis for differentiating its State energy problems from supply and consumption issues facing other States. (AHAM, No. 2198, at 11 and Whirlpool, No. 2194, at 2–3). AHAM also suggested that States must show that less restrictive alternatives, such as voluntary standards, consumer education or rebates, cannot accomplish substantially the same objectives as standards. (AHAM, No. 2198, at 12).

The Act is clear as to the criteria DOE must consider and evaluate in determining whether or not to grant a State petition. In light of such clarity, the Department disagrees with the comments that petitioners will not know what information to include in their petitions.

The March 1988 proposal provided examples of information and data that would be helpful to DOE in its consideration of a petition. The Department believes those examples are adequate guidance. Moreover, in view of the criteria described above, DOE will reject, with explanation, any petition which does not contain sufficient information. In such a case, the petition may be resubmitted.

The CEC stated that, since time will be of the essence in the petition process, DOE should establish regulations for a discovery process allowing for written interrogatories and requiring that all data and quantitative statements in petitions and comments be fully documented. (CEC, No. 2201, at 11.)

Section 336(a)(1) of the Act includes the petition process in a provision

requiring opportunity for public comment during the rulemaking processing. However, under section 336(a)(2), the "opportunity to question" applies only to rulemakings conducted under section 325 (standards) of the Act. It appears that the CEC contemplates other types of evidentary procedures which are appropriate for adjudicatory types of hearings. DOE does not believe the petition process should be so expanded.

In regard to documentation of data and quantitative statements contained in petitions and comments, section 327 of the Act already requires that States and interested parties provide "evidence" on which DOE must base its determination. The Department believes that those who will file petitions and submit comments are aware that their ability to succeed in such rulemaking proceedings will be based on the information contained in these documents. As such, DOE expects that data and other quantitative material will be documented fully. As mentioned previously, DOE will review thoroughly each petition and comment for content and completeness.

AHAM, GAMA and ARI commented that in no case should DOE grant a petition without holding a public hearing. (AHAM, No. 2197, at 12; GAMA, No. 2196, at 6; and ARI, No. 2197, at 2.) AHAM stressed that at least one mandatory public hearing should be held on each petition unless DOE determined that "a petition is insufficient on its face to warrant further consideration." (AHAM, No. 2198, at 12.)

As discussed above, section 336(a)(1) of the Act requires DOE to hold a hearing and provide a comment period for rulemakings pertaining to (section 327 of the Act) state petitions, as well as for rulemakings conducted under sections 323, 324, 325 and 328 of the Act. Therefore, DOE has concluded that it is unnecessary to include this as a requirement in today's rule.

ARI questioned whether the **Federal Register** notice of a final rule granting or denying a petition will contain the actual text of DOE's determination. ARI believes such text should be included and available for public review. ARI also stated that § 430.48 (request for reconsideration) of the March 1988 proposal was inadequate. ARI suggested that this section require petitioners requesting DOE reconsideration of a denial to serve copies of such request on interested persons, at least those who commented on the petition. ARI also urged DOE to publish a **Federal Register** notice upon receipt of a request for reconsideration, soliciting comments, data and information. (ARI, No. 2197, at 3–4.)

Section 430.46 of the March 1988 proposal and today's rule state that the **Federal Register** notice will include the reasons and basis for a final rule granting or denying a petition. As such, the **Federal Register** notice is the actual text of DOE's determination. Also, since denial of a petition will be reconsidered only if it demonstrated the denial was based on an error in law or fact, and that evidence of the error is found in the record of the proceeding, this process is not subject to the public notification and request for comment requirements of a rulemaking proceeding. The Department does have the flexibility, however, to order a petitioner to serve copies of the request for reconsideration, in a timely manner, on interested persons.

Finally, the NYSEO requested clarification on the applicability of the preemption provisions concerning products manufactured prior to the effective date of Federal standards. The NYSEO interprets the Act to provide that such products remain subject to pre-existing state standards. (NYSEO, No. 2199, at 2–3.)

The Department agrees with the NYSEO's understanding of the Act. A State standard would be preempted upon the effective date of the applicable Federal standard. However, the pre-existing State standard would apply to products manufactured prior to the effective date of the Federal standard.

*c. Small Business Exemptions*

Pursuant to section 325(q) of the Act, DOE proposed, and today is adopting, a new Subpart E that establishes procedures by which manufacturers, whose annual gross revenues for the preceding 12-month period do not exceed $8,000,000, may petition DOE for temporary exemption from all or part of an energy conservation standard for up to 24 months from the date such standard is effective.

In reference to this provision, ARI urged DOE to make it clear that an exemption may not exceed 24 months. ARI also commented that the March 1988 proposal did not provide adequate opportunity for public review and comment on applications for exemption. ARI recommended that all materials submitted by an applicant be available for public review, that DOE publish a **Federal Register** notice upon receipt of each application, and that DOE be explicit in providing opportunity for public comment on such applications. (ARI, No. 2197, at 4).

The Department believes that the language in both the discussion and rule sections of the March 1988 proposal was quite clear. On page 7115 of the **Federal Register** notice, DOE stated that such exemptions are temporary and may be granted for up to 24 months from the date the applicable standard is effective. On page 7124 of the same notice, under § 430.57 "Duration of Temporary Exemption," DOE proposed: "A temporary exemption terminates according to its own terms but not later than twenty-four months after the effective date for which the exemption is allowed." Furthermore, DOE has determined that no additional provisions are necessary for public review of and comment on applications for exemption. ARI seeks a rule requiring all materials submitted to DOE be publicly available. Section 430.53 provides that all applications and supporting documents "may" be made available for public review. Some documents, however, might not be made available. For example, should DOE determine that an entire support document is exempt from public disclosure pursuant to 10 CFR 1004.11, the Department would not make such document available for public review. Likewise, DOE would not make publicly available an application that was determined to be incomplete and was being returned, without further review, to the applicant. DOE agrees with ARI on the potential competitive effects of a small business exemption. The Department also is aware of and must be concerned with the potential competitive effects of information contained in such applications. For this reason, DOE will determine, on a case-by-case basis, which materials will be made available for public review.

The Department agrees with ARI that DOE should publish a **Federal Register** notice with regard to any application for exemption that DOE has received and accepted for filing and that such notice should solicit comments from interested persons. Today's rule reflects ARI's recommendation.

*d. Certification and Enforcement*

The certification procedures in the March 1988 proposal were patterned after the reporting requirements for FTC's appliance labeling program and trade association certification programs. Generally, the comments DOE received concerning certification and enforcement characterized these provisions of the March 1988 proposal as equitable and minimally burdensome. The comments included requests for clarification on issues such as data submission, records maintenance, definitions, sampling and compliance testing; and also included suggested

revisions primarily to the proposed enforcement provisions.

GAMA, Whirlpool, ARI, IEC, CEC and AHAM commented on DOE's proposed reporting requirements under § 430.62. Regarding third party reporting, IEC questioned whether a trade association, such as ARI, may submit a report on behalf of a manufacturer. (IEC, No. 2129, at 2). ARI commented that it believes that its statement on behalf of any participant should satisfy the requirements of the compliance statement (ARI, No. 2197, at 5). The CEC maintained that while a third party may perform the reporting function, responsibility for accuracy and completeness remains with the manufacturer. (CEC, No. 2201 at 5).

Section 430.62(e) of today's final rule remains unchanged—it permits a manufacturer to use a third party, such as a trade association, to submit the information required under § 430.62. However, ARI is incorrect in assuming that this satisfies the requirements of the compliance statement. A third party may not make any statements on behalf of a participating manufacturer to substitute for the compliance statement. The regulation merely permits the third party to transmit the compliance statement to DOE. Therefore, the CEC is correct that the manufacturer, alone, is responsible for all of the information submitted by a third party. If a manufacturer elects to use a third party, the compliance statement must include this, and therefore, serves as notification to DOE that the manufacturer has authorized a third party to submit such information.

The Department emphasizes that the compliance statement need not be resubmitted with future certification reports for new models unless the information contained in the original compliance statement no longer is accurate.

The CEC stated that a meaningful certification and enforcement program should include a provision for DOE to "spot check" wholesale and retail outlets and for DOE to publish directories to assist consumers in determining the efficiency of a model and whether it meets the applicable standard. The CEC also stressed that DOE should accept certification data only from programs that conduct routine testing for a significant percentage of basic appliance models available for sale each year and include procedures for challenging data open to all participants in the program. (CEC, No. 2201, at 4).

The Department rejects this point of view on the basis of CEC's earlier statement that testing is the manufacturer's responsibility. A third party may submit the information only if the manufacturer certifies compliance. The Department also does not agree with the CEC on the necessity to publish directories, particularly in light of the availability and use of trade association directories, and the FTC labeling program. In regard to a need for the "threat of periodic spot checks," nothing in the Act or in DOE's regulations prevents the Department from conducting such random checks.

In commenting on the reporting requirements of § 403.62(b), ARI urged DOE to revise the reporting dates, bringing them more in line with the effective dates of standards. In particular, ARI pointed out that while the reporting date for all central air conditioners and heat pumps is on or before July 1, 1991 (six months before standards are in effect for split system central air conditioners and heat pumps), that date is 18 months before the effective date of standards for single package central air conditioners. ARI suggested that reporting dates be changed to 30 days prior to the effective date of any standard. (ARI, No. 2197, at 4).

The Department agrees with ARI that the 18-month difference is excessive. Moreover, DOE wants to clarify that this is not an annual reporting requirement. The dates specified in the March 1988 proposal represent initial, one-time only, reporting requirements. In addition, to reduce the reporting burden on manufacturers and third parties, DOE selected dates that coincide with FTC reporting deadlines. To simplify DOE's reporting requirements, § 430.62(b) of today's final rule specifies that the initial (one-time only) reporting requirement for all existing covered products must be submitted no later than the effective date of the standard for each product.

For new models, introduced after a standard becomes effective, the certification report must be submitted to DOE prior to or concurrent with any distribution of such model. This change, as reflected in today's rule, also addresses an issue raised by GAMA concerning its certification directory publication cycle.

In submitting certification reports on behalf of program participants, AHAM stated that it plans to submit its certification directory yearly, with monthly supplements, as needed, to reflect new models. (AHAM, No. 2198, at 5). GAMA explained that it, too, will use its certification directory, which is published twice a year. However, GAMA argued that its publication schedule conflicts with DOE's proposal that information on new models be submitted prior to the distribution of such models. GAMA requested that DOE allow manufacturers 30 days after a new model is introduced before requiring the submission of a certification report, at which time GAMA would submit to DOE a monthly supplement to the GAMA directory. (GAMA, No. 2196, at 3).

The Department believes that its clarification and simplification of the reporting requirements will reduce the reporting burden on manufacturers and third parties. In light of the lead-time necessary to introduce a new model, DOE believes there is ample time for a manufacturer or third party to submit the necessary information prior to or at the time a new model is introduced. Therefore, DOE rejects GAMA's suggestion for a 30-day waiting period.

IEC questioned the meaning of the statement under § 430.62(c) that "any change to a basic model which affects energy consumption may constitute the addition of a new basic model subject to the requirements of § 430.61." (IEC, No. 2195, at 2). If a manufacturer makes any adjustments or changes to a basic model that result in a different rating, the Department will consider that to be a new basic model.

IEC also inquired as to how an indoor coil manufacturer's basic model would qualify as an "other than tested model" pursuant to § 430.63(b) of the March 1988 proposal. (IEC, No. 2195, at 2). In prescribing test procedures for central air conditioners, including heat pumps, DOE recognized the extreme burden and cost associated with testing these products. Therefore, the test procedure requires testing only of the outdoor unit and indoor coil that represent a manufacturer's highest sales combination. As provided by § 430.23(m) of DOE regulations, all other combinations marketed by a manufacturer, or coil only manufacturers, may be rated on the basis of computer model.

AHAM, Whirlpool and GAMA also commented on the March 1988 proposal's requirement under § 430.62(c) that discontinued models shall be reported in the next annual report. GAMA viewed this requirement as unnecessary since in GAMA's certification program discontinued models "simply don't appear in the next directory." (GAMA, No. 2196, at 4). AHAM and Whirlpool also recommended that DOE delete this requirement since a model may be discontinued in production, but remain in distribution for several years afterward. Therefore, since there is no

way to determine when a model is discontinued in distribution, AHAM and Whirlpool stressed that it is important that once a model is certified, it remains certified so as to avoid the perception of a noncompliant product. (AHAM, No. 2198, at 4–5 and Whirlpool, No. 2194, at 2). AHAM recommended that it could conduct an annual review and provide DOE a list of models no longer in its directory. (AHAM, No. 2198, at 5).

The Department accepts the reasoning offered by these comments. Therefore, today's final rule requires a manufacturer or third party to notify DOE, in writing, of any model no longer being manufactured. Such notification may be a letter or copy of a previous directory, highlighted to indicate the discontinued model(s).

Finally, ARI interpreted and DOE agrees that computer records are acceptable for meeting the requirement under § 430.62(d) that records be maintained for two years from the date production of a particular model has ceased. (ARI, No. 2197, at 5).

The majority of the comments submitted to DOE addressed enforcement-related issues, and are discussed below.

The Hydronics Institute offered comments on enforcement testing in which it described anomalous results of applying the proposed sampling provisions. The Hydronics Institute illustrated an application of the proposed provisions for two groups, each with four test results. It argued that the first phase of enforcement testing should have a five percent tolerance as does the second phase and asserts that absent such a tolerance a sample of boilers with a mean 79.1 AFUE would pass, while a sample with a mean of 79.75 AFUE would not. (Hydronics Institute, Testimony).

The first group in the Hydronics Institute's example consists of four boiler test results, all of which are below the standard level of 80 percent AFUE and demonstrate a small standard deviation. The second group of four test results also are below the standard level of 80 percent AFUE but demonstrate a relatively large standard deviation compared to the first group. Since all the test results are below the standard level, the sample means are below the standard level, i.e., 79.75 AFUE for the first group and 79.1 for the second group. The Hydronics Institute shows that the group with a mean of 79.75 AFUE and a small standard deviation would be determined in noncompliance in step 6 of the proposed provisions, whereas the group with the lower AFUE rating (79.1), but larger standard deviation group would be judged in compliance in step 7. The Hydronics Institute concluded that "the procedure favors divergent test results on the first test samples." Accordingly, Hydronics Institute asks that the procedure be checked for possible error.

The Department has reviewed the Hydronic Institute's comments and concludes that the proposed provisions are appropriate. The perceived inconsistency is a result of the nature of statistical inferences, rather than an error in the equations. In the example provided, the procedure does, in fact, favor divergent test results at that particular point in the process, i.e., steps 6 and 7. In other words, the population represented by the second group, with its larger degree of uncertainty, i.e., larger standard deviation, is given a better probability of having a true mean at or above the standard level than that of the population represented by the first group. In the examples, the two probabilities happen to be above and below the level chosen as the "reasonable risk" threshold, thus explaining the opposing determinations of compliance and non-compliance. Since the issue raised by the Hydronics Institute is complex, DOE believes it is appropriate to discuss the concept of "reasonable risk" in today's notice. In general terms, the two types of risk are: "Manufacturer risk," which is the probability, based on sample data, of being, in fact, in compliance when the sample data indicate a determination of noncompliance; and "government risk," which is the probability, based on sample data, of being, in fact, in noncompliance when the sample data indicate a determination of compliance. As with all statistical matters, the absolute is never known. (A "reversal" is a useful way to express the adverse impacts of these risks. For example, at steps 6 and 7, the proposed procedures assign a 2.5 percent probability of reversal as the maximum allowed.)

Applying these terms to the Hydronics Institute example, the population represented by the first group has less than a 2.5 percent chance of a reversal, i.e., being, in fact, in compliance when the sample data indicates noncompliance. Similarly, the population represented by the second group has less than a 2.5 percent chance of a reversal, i.e., being in noncompliance when the sample data indicates compliance.

The Hydronics Institute attributes the problem to the five percent tolerance "given" in these procedures. Rather, the tolerance allowed is in the form of upper and lower confidence limits. In step 11, the five percent tolerance mentioned is the limit of tolerance allowed by the confidence limits, and the term "0.05 (EPS)" in step 7 is not a tolerance, but the mathematical expression of the difference between a standard and 95 percent of the standard.

Whirlpool, GAMA, AHAM and ARI pointed out that while the preamble to the March 1988 proposal stated that DOE's receipt of "credible and substantiated" information triggers DOE's actions to determine compliance of a certified product, the rule itself is vague. (Whirlpool, No. 2194, at 2; GAMA, No. 2196, at 4; AHAM, No. 2198, at 6; and ARI, No. 2197, at 5). Whirlpool also suggested that DOE discourage "nuisance" challenges by requiring test data to support any challenge of energy performance. (Whirlpool, No. 2194, at 6). The CEC also commented that DOE should establish a petition process for such challenges and complaints from manufacturers and consumers. (CEC, No. 2201, at 7).

The Department believes that § 430.70(a)(1), as stated in the March 1988 proposal and in today's final rule, is clear—the Department "may" conduct testing of a particular product upon receipt of information concerning the energy performance of that product. The Department will evaluate thoroughly any complaint received, and will issue a test notice if DOE determines that such action is warranted. DOE is not requiring submission of test data since, in several instances, such data would be unnecessary. For example, in the case of prescriptive standards, test data would be inappropriate in cases concerning pilot lights in certain appliances. Furthermore, compliance with certain performance standards can be determined by reviewing design information. Determination of noncompliance will be made in accordance with the enforcement provisions found in Appendix B to Subpart F. Therefore, the Department will determine what information is appropriate on a case-by-case basis. Furthermore, nothing in the Act or in DOE's regulations prohibits DOE from requiring the submission of additional information, including test data.

In reference to CEC's suggestion, the Department believes that establishing procedures and criteria for a separate petition process would be restrictive and inappropriate. Since DOE has the flexibility to require the submission of additional or supporting information, DOE sees no purpose in requiring a prescribed format or specific procedures for submitting such information. Furthermore, since such a submittal does not serve as a request for rulemaking or similar action, e.g.,

request for waiver, DOE sees no justification for requiring a petition process. Section 430.70(a)(1) of today's rule does include the requirement that information submitted to DOE be in writing.

GAMA and ARI urged DOE to adopt the term "basic model" instead of "model or basic model" as included in §§ 430.70(a)(1)(iii) and 430.71(a) of the March 1988 proposal. (GAMA, No. 2196, at 4 and ARI, No. 2197, at 6). In addition, IEC stated that the proposal did not define the term "basic model."

The Department agrees with GAMA and ARI that use of both terms could cause confusion. Therefore, today's final rule specifies only "basic model." In response to IEC's comment, since DOE is not revising the definition of "basic model" as it appears in § 430.2 Title 10 of the Code of Federal Regulations, the term is not included in today's final rule.

GAMA and ARI also questioned the rationale, in § 430.70(a)(1)(iii), that provides for testing alternative basic models when a selected basic model is unavailable for testing. These comments maintained that there is no justification for testing any model other than the basic model alleged to be in noncompliance. (ARI, No. 2197, at 6 and GAMA, No. 2196, at 4).

The Department believes there may, indeed, be occasions when testing an alternative basic model is necessary. For example, if a particular condensing unit is combined with several different evaporation coils, each combination could be a different basic model. If one combination is not available, i.e., a particular coil is not available, an alternative coil could be selected for testing, representing an alternative basic model.

Finally, IEC requested clarification of "the method of selecting the test sample" under § 430.70(a)(1)(iii). (IEC, No. 2195, at 2). Section 430.70(a)(i) states that DOE will offer a manufacturer the opportunity to verify compliance, and today's rule specifies that the manufacturer may meet with DOE. As appropriate, in correspondence and/or meetings, DOE will discuss the method of selecting test units on a case-by-case basis.

Several comments sought clarification concerning the payment of testing costs. (GAMA, No. 2196, at 5; ARI, No. 2197, at 5; IEC, No. 2195, at 2–3; and CEC, at 7).

The Department is to pay for all enforcement testing performed under steps 1–11 of Appendix B to Subpart F of Part 430. The manufacturer bears the cost of additional testing, steps A–C of Appendix B—manufacturer-option testing. Such costs are to be paid directly to the testing facility. In the case of option testing, the manufacturer is responsible for contracting with the testing facility.

GAMA suggested that DOE require an initial shipment of four units out of the test sample of 20 units. (GAMA, No. 2196, at 5). To protect against any modification or substitution of units, GAMA and ARI recommended that DOE identify, mark and package each unit selected with a tamper-proof seal. ARI also suggested that the independent lab conducting the testing could also inspect each unit for tampering. (GAMA, No. 2196, at 5 and ARI, No. 2197, at 6).

The Department believes that such a requirement would be an unnecessary burden in a process DOE had made every effort to be simple and expeditious. Therefore, all units, up to 20, specified in a test notice, are to be shipped according to instructions contained in the notice. DOE will determine the number of units required after review of information described in § 430.70(a)(1)(i). A "reasonable" number of units, no less than four and no more than 20, will be the amount DOE determines, upon review of the pertinent information, is appropriate for compliance testing.

NEMA stated that the sampling method required under § 430.70 is inappropriate for fluorescent lamp ballasts since the practice in that industry is to design and produce every ballast to meet performance standards. Therefore, NEMA proposed that all ballasts be designed to meet the ballast efficiency factor prescribed in the 1988 Amendments and be exempt from the sampling procedures in the March 1988 proposal. (NEMA, No. 2202, at 4).

The Department is not persuaded by NEMA's argument and believes that NEMA has misunderstood the testing requirements. Section 430.70(a)(3) of the March 1988 proposal states that DOE's determination of a basic model's compliance will be based on testing conducted according to the statistical sampling procedures in Appendix B of the proposal and in the testing procedures in § 430.23 of Title 10 Code of Federal Regulations. Since these procedures minimize testing and associated costs, e.g., § 430.23 permits testing of as few as two units for each basic model, today's final rule provides no exemptions or exceptions to the sampling requirements. The Department emphasizes that the sampling procedures minimize the burden on manufacturers since there is no requirement to test each unit of a basic model to demonstrate that the basic model is in compliance. The regulations take into account the product variability that occurs in the manufacturing process and do not penalize the manufacturer for the anomalous unit.

Finally, while today's final rule does not include sampling provisions under § 430.23 for fluorescent lamp ballasts, DOE will propose such provisions in an upcoming test procedure rulemaking.

ARI also commented on enforcement sampling, and contended that if, for example, a central air conditioner or heat pump basic model is found to be noncompliant, such noncompliance determination applies only to the condensor-evaporator combination found in that unit, and not to other basic models using the same condensing unit. (ARI, No. 2197, at 7).

While ARI's assertion may be valid in some instances, it may not be so in others. The Department will make such determinations on a case-by-case basis.

The March 1988 proposal specified that DOE may subdivide a batch utilizing such criteria as date of manufacture, component supplier, location of manufacturing facility, or other criteria to differentiate one unit from another. Section 430.70(a)(4)(1). ARI maintained that date and location are adequate for identifying units and therefore, DOE should delete the language "or other criteria." (ARI, No. 2197, at 7).

The Department does not view that identification criteria as restrictive or burdensome. Each manufacturer must identify each unit using criteria set forth in the test notice, such as date and location of manufacture. A category for "other criteria" may indeed be helpful to a manufacturer and DOE in differentiating units. As discussed above, in correspondence and/or meetings, DOE and the manufacturer will determine if other criteria would be helpful in differentiating units.

In a separate reference to date of manufacture, the CEC argued that the current FTC labels will be insufficient for consumers to determine whether an appliance complies with the applicable Federal standard. The CEC maintained that without a label requiring date of manufacture, it will be impossible to know whether the unit is even required to meet a particular standard. DOE should require manufacturers to display prominently a label on every certified model giving the month and year of manufacture and stating that the unit has been certified to be in compliance with the applicable Federal standard. (CEC, No. 2201, at 5–6).

The Department recognizes the situation described by CEC and agrees that for a period of time following the effective date of any standard, consumers will make purchase decisions

without the certainty a model complies with the standard. However, while agreeing that such information might be helpful, DOE believes that such benefit does not provide an adequate basis for requiring manufacturers to display an additional label on each unit. This is true because, as discussed above, upon notification by DOE, a manufacturer is required to submit such identifying information to DOE as part of establishing compliance prior to entry of the model into distribution.

ARI and IEC recommended that DOE provide for units that fail compliance testing due to defective components or component failure. (ARI, Testimony and IEC, No. 2195, at 2).

The Department agrees that if a unit is inoperative, it cannot be tested. Therefore, today's final rule provides for the replacement or repair of defective components or units. For the purposes of today's rule, DOE considers a defect as that which prevents the product from being operated according to the manufacturer's intent, design and directions.

AHAM maintained that DOE should delete § 430.70(a)(6)(iv), requiring a manufacturer to cease distribution of a model being tested at the manufacturer's option. (AHAM, No. 2198, at 7–9). AHAM argued that DOE has no authority for such a regulation other than seeking a court injunction. AHAM would accept such a provision if it served simply to suggest cessation of distribution based on indications of noncompliance and to notify the manufacturer that civil penalties or an injunction may be sought. (AHAM, No. 2198, at 7–10).

In addition, GAMA stressed that cessation of distribution should be required only if non-compliance is determined upon completion of all tests conducted at the manufacturer's option. To require cessation of distribution before such time would effectively preclude the additional testing provided under § 430.70(a)(6) and the requirement of § 430.71(a)(2) would likely halt sales and damage a model's reputation. (GAMA, No. 2196, at 5).

ARI emphasized that, upon receipt of a manufacturer's request for optional testing, DOE should conduct prompt testing according to prescribed deadlines. (ARI, No. 2197, at 7–8).

First, DOE rejects AHAM's argument concerning DOE's authority to require cessation of distribution. Section 325(o) of the Act states that "any new or amended * * * standard * * * may include any requirement which the Secretary determines is necessary to assure that each covered product * * * meets the required minimum level of energy efficiency * * * specified in such standard." Furthermore, section 328 of the Act authorizes the Department to issue such rules as it deems necessary to carry out the provisions of the Act.

In addition, while DOE accepts GAMA's observations concerning the potential impacts of cessation of distribution, neither GAMA nor AHAM have been persuasive in arguing why distribution of a model, determined noncompliant in accordance with § 430.70, should be allowed to continue.

Finally, DOE agrees that a manufacturer's optional testing should be conducted with great haste since a determination of compliance will result in DOE's issuance of a notice allowing resumption of distribution. However, as discussed earlier, such manufacturer's optional testing is done at an independent testing laboratory contracted for by the manufacturer, not DOE. Therefore, DOE is not prescribing deadlines for work performed under such contracts.

There was some confusion about the requirement, under § 430.71(a)(2), to give written notice of a determination of compliance.

AHAM stated that this requirement is unclear and inquired about the meaning of "notifying all persons whom the manufacturer has distributed units of the basic model manufactured since the date of the last determination of compliance." AHAM asked if DOE is referring to initial compliance with the standard, the effective date of the standard, or does the requirement presume that a manufacturer was, at some time, in compliance? AHAM also suggested that DOE revise the requirement so that notification is limited to those persons who received noncomplying products. (AHAM, No. 2198, at 7).

The CEC argued that manufacturers should be required to notify dealers, distributors and consumers and that consumers should be entitled to receive, at manufacturer expense, replacement units that comply with the standard. (CEC, No. 2201, at 7–8).

ARI stressed that cessation of distribution applies only to unsold units and future production and that unless it can be shown that a manufacturer deliberately misrepresented the rating, manufacturers should not be required to replace or retrofit units already purchased since a noncompliant model would not pose a health or safety risk.

Finally, IEC requested clarification of the term "distributed to" as used in § 430.71(a)(2) since § 430.71(a)(4) permits a manufacturer to modify a noncompliant model and bring it into compliance as long as records prove that the modifications were made to all units prior to distribution in commerce. (IEC, No. 2195, at 3).

With respect to AHAM's request for clarity to § 430.71(a)(2), DOE finds that the notification requirement could apply in any of the instances AHAM cited; that is, the requirement applies to any determination of noncompliance, whether it involves a new basic model or a basic model that previously was found to be in compliance. In addition, while the Department rejects AHAM's suggestion to limit the recipients of notification to those who received noncomplying units, the test notice will specify how the batch sample will be selected. If DOE has reason to believe that there are factors causing noncompliance, e.g., use of compressors from a new supplier, DOE will consider such information in making a selection for a batch sample. If DOE determines that such a factor exists and its affects the model's efficiency, those units will be determined to be a new basic model and notice is to be limited to those persons to whom the applicable basic model was distributed.

As to whom should receive written notification, a manufacturer is required to notify all parties to whom the manufacturer has distributed the basic model for resale. The extent of such notification may vary from manufacturer to manufacturer, depending on each firm's marketing and distribution methods. The Department disagrees with the CEC that manufacturers should be required to notify consumers. Such a task would be an enormous, at best, incomplete, effort. Manufacturers do not, as a rule, have records identifying individual purchasers and the extent and accuracy of such recordkeeping varies greatly among department stores, discount stores and catalog businesses. Furthermore, the Department believes it is inappropriate to prescribe, through regulation, that manufacturers provide replacement units for consumers. Section 335(a)(1) of the Act provides that "any person may commence a civil action against any manufacturer or private labeler who is alleged to be in violation * * *." Since the Act includes such a provision for citizen suits and does not specify or suggest that the Department prescribe other remedies for citizens, DOE believes such relief may be addressed in the courts.

The Department's clarification, above, of the term "distributed to" is responsive to IEC's inquiry concerning notification requirements. However, it appears that IEC has misinterpreted the provisions of § 430.71(a)(4). While the regulation permits a manufacturer to modify a

basic model so that it complies with the standard, such modification results in a new basic model which must be certified pursuant to § 430.62 of today's rule. Also, a manufacturer's records must show that the modifications were made to all units of the new basic model prior to distributing these units, i.e., prior to distributing these units to resellers of that product. Therefore, § 430.71(a)(4) does not address distribution of the noncompliant basic model.

The CEC urged DOE to specify in today's rule that the term "each violation," as included in section 333(a) of the Act, means each separate unit of a noncomplying basic model. The Department concurs with CEC's interpretation. However, DOE believes the language of the Act is clear and requires no further explanation.

The CEC also recommended that DOE strengthen § 430.65 (Exports) to require prominent display of the prescribed stamp or label identifying a product as intended for export. Also, DOE should specify who is liable for penalties should an export unit be marketed in the U.S. (CEC, No. 2201, at 8–9).

The Department believes that the export labeling requirement of the Act (section 330) is sufficient. Upon finding that a product manufactured for export has been marketed in the U.S., the Department will determine at which point in the marketing chain the transaction occurred and will take appropriate action.

Finally, AHAM submitted a list of technical revisions including spelling and terminology corrections, to Appendix B of the March 1988 proposal. (AHAM, No. 2198, at 6). DOE has included most of these revisions in today's notice. However, it appears that AHAM has misunderstood steps 10a through 11b. Steps 10a and 11a address energy consumption standards; steps 10b and 11b address energy efficiency standards. AHAM's suggested revisions would, in fact, result in computations only for energy consumption standards, i.e., steps 10a and 10b would be identical, as would steps 11a and 11b.

## III. Environmental, Regulatory Impact, Regulatory Flexibility, Paperwork Reduction Act, Takings Assessment, and Federalism Assessment Reviews

### *a. Environmental Review*

Pursuant to section 7(c)(2) of the Federal Energy Administration Act of 1974, a copy of the March 1988 proposal was submitted to the Administrator of the Environmental Protection Agency (EPA) on April 22, 1988, for his comments concerning the impact of this proposal on the quality of the environment. The EPA had no comments on the Department's proposal.

The Department is adopting procedures implementing the Act's provisions for (1) certification and enforcement; (2) small business exemptions; and (3) petitions concerning exemption of State standards.

The Department believes the first element clearly is not environmentally significant since it will not result in any environmental impacts.

For applications seeking a temporary small business exemption, as well as for all petitions seeking exemption from Federal standards or supersession of State standards, DOE will conduct an appropriate National Environmental Policy Act (NEPA) review on a case-by-case basis.

The Department believes that today's action is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, and that neither an Environmental Impact Statement nor an Environmental Assessment is required.

### *b. Regulatory Impact Review*

DOE has concluded that the rule is not a "major rule" for purposes of Executive Order 12291 because it will not result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. This conclusion is based on several factors. First, while the imposition of conservation standards will result in an increase in the cost of certain appliances, this increase will be offset by a reduction in energy costs. Second, the costs of complying with the testing requirements of the rule are not significant. For example, there will be no additional testing costs for labeled products, i.e., refrigerators, refrigerator-freezers, freezers, water heaters, furnaces, central air conditioners and room air conditioners, since DOE is accepting the applicable testing requirements of the Federal Trade Commission. Likewise, there will be no testing costs for those products that have design standards, i.e., clothes washers, dishwashers, and clothes dryers. With regard to pool heaters while not a labeled product or covered by a trade association certification program, it is likely that testing already has been accomplished because of California's standards for this product. Finally, any impacts resulting from a conservation standard for television sets will be addressed in a future rulemaking for this product. Therefore, in accordance with section 3(c)(3) of the Executive Order, which applies to rules other than major rules, today's final rule was approved by OMB without a regulatory impact analysis.

### *c. Small Entity Impact Review*

In light of the foregoing, the Department has determined and hereby certifies pursuant to section 605(b) of the Regulatory Flexibility Act that today's action will not have a "significant economic impact on a substantial number of small entities." To minimize potential impacts on small businesses which are appliance manufacturers, DOE is, in fact, adopting rules that provide relief, in the form of temporary exemptions, from the applicable conservation standards.

In addition, as mentioned above, the Department will consider, as appropriate, any significant economic impact on small entities in deciding petitions to preserve or supersede State standards under section 327(d) of the Act.

### *d. Paperwork Reduction Act Review*

This final rulemaking includes information collections that were previously cleared by the Department under OMB Control Number 1910–1400, expiring June 30, 1989.

### *e. Takings Assessment Review*

Executive Order 12630 (53 FR 8859, March 18, 1988) directs that, in proposing a regulation, an agency conducts a "takings" review. Such a review is intended to assist agencies in avoiding unnecessary takings and help such agencies account for those takings that are necessitated by statutory mandate.

For purposes of the Order:

"Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property.

It appears that there are three parts of the appliance standards regulatory

program that should be reviewed for "takings implications." These are testing and certification requirements, the impacts of standard levels, and possible DOE testing of products for validation.

With regard to the first part, namely, testing and certification, the Department believes that such a requirement, implementing a long-established statutory mandate in a manner calculated to minimize adverse economic impacts does not constitute a "taking" of private property. Executive Order 12630 applies to those regulatory actions which are a substitute for the exercise of governmental eminent domain power. This applies to situations where regulations exact a transfer of title, possession, or beneficial use of private property without compensation. The regulations under consideration are simply an exercise of police power and do not exact such a transfer of private property.

Similarly, the Department's possible validation testing does not constitute a "taking," within the limitation described above.

The Department believes that the fact that while an energy conservation standard may limit some manufacturers in the range of appliance efficiencies that they can produce, such narrowing of the energy efficiency range does not constitute a "taking" in the sense described above. Furthermore, this rulemaking simply recites the standards explicitly mandated by the Act.

In short, in none of the three parts of the appliance standards program does the Department believe that the provisions of E.O. 12630 pertain.

*f. Federalism Assessment Review*

Executive Order 12612 (52 FR 41685, October 30, 1987) requires that regulations or rules be reviewed for any substantial direct effects on States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects, then Executive Order 12612 requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a regulation or a rule.

DOE has identified a substantial direct effect that standards have on State governments. It initially preempts inconsistent State regulations. However, DOE has concluded that the initially preemptive effect is not sufficient to warrant preparation of a federalism assessment for two reasons. First, DOE does not have discretion under the Act to avoid promulgating a preemptive regulation because of a policy preference for State regulation as a general matter. Second, the Act provides for subsequent State petitions for exemption which necessarily means that the determination as to whether a State law prevails must be made on a case-by-case basis using criteria set forth in the Act. When DOE receives such a petition, it will be appropriate to consider preparing a federalism assessment consistent with the criteria in the Act.

*g. Regulatory Flexibility Review*

The Regulatory Flexibility Act of 1980 (Pub. L. 96-354) requires an assessment of the impact of proposed regulations on small businesses. Small businesses are defined as those firms within an industry that are privately owned and less dominant in the market.

In light of the foregoing, the Department has determined and hereby certifies pursuant to section 605(b) of the Regulatory Flexibility Act that today's action will not have a "significant economic impact on a substantial number of small entities." To minimize potential impacts on small businesses which are appliance manufacturers, DOE is, in fact, adopting rules that prove relief, in the form of temporary exemptions, from the appliance conservation standards.

In addition, the Department will consider, as appropriate, any economic impact on small entities in deciding petitions to preserve or supersede State standards under section 327(d) of the Act.

In consideration of the foregoing, Part 430 of Chapter II of Title 10, Code of Federal Regulations is amended, as set forth below.

Issued in Washington, DC, January 24, 1989.

**Dr. John R. Berg,**

*Assistant Secretary, Conservation and Renewable Energy.*

**Lists of Subjects in 10 CFR Part 430**

Administrative practice and procedure, Energy conservation, Household appliances.

## PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for Part 430 is revised to read as follows:

**Authority:** Energy Policy and Conservation Act, Title III, Part B, as amended by National Energy Conservation Policy Act, Title IV, Part 2, by the National Appliance Energy Conservation Act, and by the National Appliance Energy Conservation Amendments of 1988 (42 U.S.C. 6291-6309).

2. Section 430.1 is revised to read as follows:

**§ 430.1 Purpose and scope.**

This part establishes the regulations for the implementation of Part B of Title III (42 U.S.C. 6291-6309) of the Energy Policy and Conservation Act (Pub. L. 94-163), as amended by Pub. L. 94-385, Pub. L. 100-12, and Pub. L. 100-357, which establishes an energy conservation program for consumer products other than automobiles.

3. Section 430.2 is amended by revising the definition of "Act", removing the definitions of "Administrator" and "Energy efficiency standard", inserting the word "energy" in place of the last five words in the definition for "packaged terminal air conditioner," and adding the following definitions in alphabetical order:

**§ 430.2 Definitions.**

* * * * *

"Act" means the Energy Policy and Conservation Act (Pub. L. 94-163), as amended by the National Energy Conservation Policy Act (Pub. L. 95-619) and by the National Appliance Energy Conservation Act (Pub. L. 100-12).

* * * * *

"Annual fuel utilization efficiency" means the efficiency descriptor for furnaces and boilers, determined using test procedures prescribed under section 323 and based on the assumption that all—

(a) Weatherized warm air furnaces or boilers are located out-of-doors;

(b) Warm air furnaces which are not weatherized are located indoors and all combustion and ventilation air is admitted through grill or ducts from the outdoors and does not communicate with air in the conditioned space;

(c) Boilers which are not weatherized are located within the heated space.

* * * * *

"Ballast efficacy factor" means the relative light output divided by the power imput of a fluorescent lamp ballast, as measured under test conditions specified in ANSI Standard C82.2-1984.

* * * * *

"Batch" means a collection of production units of a basic model from which a batch sample is selected.

"Batch sample" means the collection of units of the same basic model from which test units are selected.

"Batch sample size" means the number of units in a batch sample.

"Batch size" means the number of units in a batch.

* * * * *

"Energy conservation standard" means:

(a) A performance standard which prescribes a minimum level of level of energy efficiency or a maximum quantity of energy use for a covered product, determined in accordance with test procedures prescribed under section 323; or

(b) A design requirement for the products specified in paragraphs (6), (7), (8), (10), and (13) of section 322(a) of the Act; and includes any other requirements which the Secretary may prescribe under section 325(o) of the Act.

* * * * *

"Fluorescent lamp ballast" means a device which is used to start and operate fluorescent lamps by providing a starting voltage and current and limiting the current during normal operation.

"Furnace" means a product which utilizes only single-phase electric current, or single-phase electric current or DC current in conjunction with natural gas, propane, or home heating oil, and which—

(a) Is designed to be the principal heating sources for the living space of a residence;

(b) Is not contained within the same cabinet with a central air conditioner whose rated cooling capacity is above 65,000 Btu per hour;

(c) Is an electric central furnace, electric boiler, forced-air central furnace, gravity central furnace, or low pressure steam or hot water boiler; and

(d) Has a heat imput rate of less than 300,000 Btu per hour for electric boilers and low pressure steam or hot water boilers and less than 225,000 Btu per hour for forced-air central furnaces, gravity central furnaces, and electric central furnaces, gravity central furnaces, and electric central furnaces.

* * * * *

"Packaged terminal air conditioner" means * * * by builder's choice of energy.

"Packaged terminal heat pump" means a packaged terminal air conditioner that utilizes reverse cycle refrigeration as its prime heat source and should have supplementary heating availability by builder's choice of energy.

* * * * *

"Pool heater" means an appliance designed for heating nonpotable water contained at atmospheric pressure, including heating water in swimming pools, spas, hot tubs and similar applications.

* * * * *

"Secretary" means the Secretary of the Department of Energy.

* * * * *

"Water heater" means a product which utilizes oil, gas, or electricity to heat potable water for use outside the heater upon demand, including—

(a) Storage type units which heat and store water at a thermostatically controlled temperature, including gas storage water heaters with an input of 75,000 Btu per hour or less, oil storage water heaters with an input of 105,000 Btu per hour or less, and electric storage water heaters with an input of 12 kilowatts or less;

(b) Instantaneous type units which heat water but contain no more than one gallon of water per 4,000 Btu per hour of input, including gas instantaneous water heaters with an input of 200,000 Btu per hour or less, oil instantaneous water heaters with an input of 210,000 Btu per hour or less, and electric instantaneous water heaters with an input of 12 kilowatts or less; and

(c) Heat pump type units, with a maximum current rating of 24 amperes at a voltage no greater than 250 volts, which are products designed to transfer thermal energy from one temperature level to a higher temperature level for the purpose of heating water, including all ancillary equipment such as fans, storage tanks, pumps, or controls necessary for the device to perform its function.

* * * * *

"Weatherized warm air furnace or boiler" means a furnace or boiler designed for installation outdoors, approved for resistance to wind, rain, and snow, and supplied with its own venting system.

* * * * *

## Subpart B—[Amended]

4. Subpart B of Part 430 is amended by removing Appendices A and B.

4a. Section 430.22 is amended by removing paragraphs (a)(6) and (b)(6); redesignating and revising paragraphs (a)(5) and (b)(5) as paragraphs (a)(6) and (b)(6) respectively; and adding new paragraphs (a)(5) and (b)(5) as follows:

### § 430.22 [Amended]

(a) * * *

(5) The annual energy use of electric refrigerators and electric refrigerator-freezers equals the representative average use cycle of 365 cycles per year times the average per-cycle energy consumption for the standard cycle in kilowatt-hours per cycle, determined according to 6.2 of Appendix A1 of this subpart.

(6) Other useful measures of energy consumption for electric refrigerators and electric refrigerator-freezers shall be those measures of energy consumption for electric refrigerators and electric refrigerator-freezers which the Secretary determines are likely to assist consumers in making purchasing decisions which are derived from the application of Appendix A1 of this subpart.

(b) * * *

(5) The annual energy use of all freezers equals the representative average-use cycle of 365 cycles per year times the average per-cycle energy consumption for the standard cycle in kilowatt-hours per cycle, determined according to 6.2 of Appendix B1 of this subpart.

(6) Other useful measures of energy consumption for freezers shall be those measures of energy consumption for freezers which the Secretary determines are likely to assist consumers in making purchasing decisions and which are derived from the application of Appendix B1 of this subpart.

* * * * *

5. Subpart B of Part 430 is amended by removing the word "(ALTERNATIVE)" in the headings to Appendices A1 and B1 and by removing the following references to Appendices A and B in § 430.22: "4.1 of Appendix A or" from paragraphs (a)(1)(ii), (a)(2)(ii), (a)(3)(ii), (a)(4)(i), (a)(4)(ii); "4.2 of Appendix A or" from (a)(4)(i), (a)(4)(ii); "4.1 of Appendix B or" from (b)(1)(ii), (b)(2)(ii), (b)(3)(ii), (b)(4)(i), (b)(4)(ii); and "4.2 of Appendix B or" from (b)(4)(i), (b)(4)(ii).

* * * * *

### § 430.22 [Amended]

6. Section 430.22 is amended by adding new paragraphs (p) and (q) as follows:

* * * * *

(p) *Pool heaters.* (1) The estimated annual operating cost (space reserved).

(2) The thermal efficiency of pool heaters, expressed as a percent, shall be determined in accordance with section 4 of Appendix P to this subpart.

(q) *Fluorescent lamp ballasts.* [Reserved]

* * * * *

7. Section 430.23 is amended by revising the first sentence of the introductory paragraph and by adding new paragraphs (p) and (q) to read as follows:

### § 430.23 Units to be tested.

When testing of a covered product is required to comply with section 323(c) of the Act, or to comply with rule-

prescribed under sections 324 or 325 of the Act, * * *

(p)(1) For each basic model[1] of pool heater a sample of sufficient size shall be tested to insure that—

(i) [Reserved]

(ii) Any represented value of the fuel utilization efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of (A) the mean of the sample or (B) the lower 97½ percent confidence limit of the true mean divided by .95.

(q) [Reserved]

8. Subpart B of Part 430 is amended by adding a sentence to the end of section 1.5 of Appendix M as follows:

**Appendix M to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Central Air Conditioners.**

* * * * *

1.15 * * * The single number HSPF energy conservation standard for central air conditioning heat pumps specified in section 325(d)(2) (A) and (B) is based on Region IV and the standardized DHR found in section 6 of this appendix, nearest the capacity measured in the 47 °F test.

* * * * *

9. Subpart B of Part 430 is amended by adding new Appendices P and Q as follows:

**Appendix P to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Pool Heaters**

1. *Test method.* The test method for testing gas- and oil-fired pool heaters shall be as specified in American National Standards Institute Standard for Gas-Fired Pool Heaters, Z21.56–1986.

2. *Test conditions.* Establish the test conditions specified in section 2.8 of ANSI Z21.56–1986.

3. *Measurements.* Measure the quantities delineated in section 2.8 of ANSI Z21.56–1986, except in the case of oil-fired heaters the measurement of energy consumption in Btu's is to be carried out in appropriate units, e.g., gallons.

4. *Calculations.* Calculate the thermal efficiency (expressed as a percent) as specified in section 2.8 of ANSI Z21.56–1986, except in the case of oil-fired heaters the expression of fuel consumption shall be in Btu's.

[1] Components of similar design may be substituted without requiring additional testing if the represented measures of energy consumption continue to satisfy the applicable sampling provision.

**Appendix Q to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Fluorescent Lamp Ballasts**

*1. Definitions*

1.1 "ANSI Standard" means a standard developed by a committee accredited by the American National Standards Institute.

1.2 "Ballast input voltage" means the rated input voltage of a fluorescent lamp ballast.

1.3 "F4OT12 lamp" means a nominal 40 watt tubular fluorescent lamp which is 48 inches in length and one and a half inches in diameter, and conforms to ANSI standard C78.1–1978(R1984).

1.4 "F96T12 lamp" means a nominal 75 watt tubular fluorescent lamp which is 48 inches in length and one and a half inches in diameter, and conforms to ANSI standard C78.1–1978(R1984).

1.5 "F96T12HO lamp" means a nominal 110 watt tubular fluorescent lamp which is 96 inches in length and one and a half inches in diameter, and conforms to ANSI Standard C78.1–1978(R1984).

1.6 "Input current" means the root-mean-square (RMS) current in amperes delivered to a fluorescent lamp ballast.

1.7 "Luminaire" means a complete lighting unit consisting of a fluorescent lamp or lamps, together with parts designed to distribute the light, to position and protect such lamps, and to correct such lamps to the power supply through the ballast.

1.8 "Nominal lamp watts means the wattage at which a fluorescent lamp is designed to operate.

1.9 "Power factor" means the power input divided by the product of ballast input voltage and input current of a fluorescent lamp ballast, as measured under test conditions specified in ANSI Standard C–82.2–1984.

1.10 "Power input" means the power consumption in watts of a ballast and fluorescent lamp or lamps, as determined in accordance with the test procedures specified in ANSI Standard C82.2–1984.

1.11 "Relative light output" means the light output delivered through the use of a ballast divided by the light output delivered through the use of a reference ballast, expressed as a percent, as determined in accordance with the test procedures specified in ANSI Standard C82.2–1984.

1.12 "Residential building" means a structure or portion of a structure which provides facilities or shelter for human residency, except that such term does not include any multifamily residential structure of more than three stores above grade.

10. Section 4.6 of Appendix N to Subpart B of Part 430 is revised as follows:

**Appendix N to Subpart B of Part 430—Uniform Tests Method for Measuring the Energy Consumption of Furnaces**

* * * * *

4.6 *Annual fuel utilization efficiency.* The annual fuel utilization efficiency (AFUE) shall be expressed as a percent and defined as:

$$AFUE = \frac{5200 N_{ss} N_u Q_{IN}}{5200 N_{ss} Q_{IN} + 2.5(1+0.7)(4600) N_u Q_p}$$

where:

5200 = average annual heating degree-days

$N_{ss}$ = as defined in 4.3 of this appendix for condensing furnaces and boilers measured by the optional direct condensate measurement method; as $N_{ss,wt}$ as defined in 4.5.14 of this appendix at each design heating requirement for modulating furnaces and boilers; or as $Effy_{ss}$ as defined in 11.2.5 of ANSI/ASHRAE 103–82 for all other furnaces and boilers.

$N_u$ = part load efficiency and is based on the assumption that all weatherized warm air furnaces or boilers are located out-of-doors; warm air furnaces which are not weatherized are installed as isolated combustion systems; and boilers which are not weatherized are installed in doors. Part load efficiency as defined in 4.3 of this appendix for condensing furnaces and boilers measured by the optional direct condensate measurement method; as $N_{u,wt}$ as defined in 4.5.1 of this appendix at each design heating requirement for modulating furnaces and boilers; or as $Effy_{hs}$ as defined in 11.2.34 of ANSI/ASHRAE 103–82 and in 4.2 of this appendix for all other furnaces and boilers except that $C_j$ and $L_j$ are defined as:

0 for boilers which are not weatherized
3.3 for furnaces which are weatherized

$C_j$ 1.7 for furnaces which are not weatherized
4.7 for boilers which are weatherized

$L_j$ jacket loss and is either assigned the value of 1 percent or determined in accordance with 8.6 of ANSI/ASHRAE 103–82 in percent

$Q_{in}$ = steady-state heat input as defined in 11.2.34 of NSI/ASHRAE 103–82

0.7 = average oversizing factor for furnaces and boilers

4600 = average non-heating season hours per year

$Q_p$ = pilot flame fuel input rate as defined in 9.2 of of ANSI/ASHRAE 103–82

**Appendix N—[Amended]**

11. Section 4.7 of Appendix N to Subpart B of Part 430 is amended by changing the following references "0 for furnaces or boilers intended to be installed indoors." to "0 for boilers which are not weatherized."; "1.7 for furnaces or boilers intended to be installed as isolated combustion systems." to "1.7 for furnaces which are not weatherized."; "3.3. for furnaces or boilers intended to be installed outdoors." to "3.3 for furnaces or boilers which are weatherized."; and "1.0 for finned tubed boilers intended for installation outdoors." to "1.0 for finned tubed boilers which are weatherized."

12. Subpart C of Part 430 is revised to read as follows:

**Subpart C—Energy Conservation Standards**

Sec.
430.31 Purpose and scope.
430.32 Energy conservation standards and effective dates.
430.33 Preemption of State regulations.

**Subpart C—[Amended]**

**§ 430.31 Purpose and scope.**

This subpart contains any energy conservation standards for classes of covered products that are required to be administered by the Department of Energy pursuant to the Energy Conservation Program for Consumer Products Other Than Automobiles under the Energy Policy and Conservation Act, as amended [42 U.S.C. 6291 *et seq.*].

**§ 430.32 Energy conservation standards and effective dates.**

The energy conservation standards for the covered product classes are:

(a) *Refrigerators/refrigerator-freezers/freezers.*

| Product class | Energy standards equations, Jan. 1, 1990 |
|---|---|
| 1. Refrigerators and refrigerator-freezers with manual defrost | 16.3 AV + 316 |
| 2. Refrigerator-freezers—partial automatic defrost | 21.8 AV + 429 |
| 3. Refrigerator-freezers-automatic defrost with top-mounted freezer without ice | 23.5 AV + 471 |
| 4. Refrigerator-freezers—automatic defrost with side-mounted freezer without ice | 27.7 AV + 488 |
| 5. Refrigerator-freezers—automatic defrost with bottom-mounted freezer without ice | 27.7 AV + 488 |
| 6. Refrigerator-freezers-automatic defrost with top-mounted freezer with through the door ice service | 26.4 AV + 535 |
| 7. Refrigerator-freezers—automatic defrost with side-mounted freezer with through the door ice | 30.9 AV + 547 |
| 8. Upright freezers with manual defrost | 10.9 AV + 422 |
| 9. Upright freezers with automatic defrost | 16.0 AV + 623 |
| 10. Chest freezers and all other freezers | 14.8 AV + 223 |

AV = Total adjusted volume, expressed in ft.³

(b) *Room air conditioners.*

| Product class | Energy efficiency ratio Jan. 1, 1990 |
|---|---|
| 1. Without reverse cycle and with louvered sides less than 6,000 Btu | 8.0 |
| 2. Without reverse cycle and with louvered sides 6,000 to 7,999 Btu | 8.5 |
| 3. Without reverse cycle and with louvered sides 8,000 to 13,999 Btu | 9.0 |
| 4. Without reverse cycle and with louvered sides 14,000 to 19,999 Btu | 8.8 |
| 5. Without reverse cycle and with louvered sides 20,000 and more Btu | 8.2 |
| 6. Without reverse cycle and without louvered sides Less than 6,000 Btu | 8.0 |
| 7. Without reverse cycle and without louvered sides 6,000 to 7,999 Btu | 8.5 |
| 8. Without reverse cycle and without louvered sides 8,000 to 13,999 Btu | 8.5 |
| 9. Without reverse cycle and without louvered sides 14,000 to 19,999 Btu | 8.5 |
| 10. Without reverse cycle and without louvered sides 20,000 and more Btu | 8.2 |
| 11. With reverse cycle, and with louvered sides | 8.5 |
| 12. With reverse cycle, without louvered sides | 8.0 |

(c) *Central air conditioners and central air conditioning heat pumps.*

| Product class | Seasonal energy efficiency ratio | Heating seasonal performance factor | Effective date |
|---|---|---|---|
| 1. Split systems | 10.0 | 6.8 | 01/01/92 |
| 2. Single package systems | 9.7 | 6.6 | 01/01/93 |

(d) *Water heaters*

| Product class | Energy factor, Jan. 1, 1990 |
|---|---|
| 1. Gas Water Heater | 0.62—(.0019 x Rated Storage Volume in gallons). |
| 2. Oil Water Heater | 0.59—(.0019 x Rated Storage Volume in gallons). |
| 3. Electric Water Heater. | 0.95—(.00132 x Rated Storage Volume in gallons). |

(e) *Furnaces*

| Product class | Annual fuel utilization efficiency | Effective date |
|---|---|---|
| 1. Furnaces (excluding classes noted below) (percent) | 78 | 01/01/92 |
| 2. Mobile Home Furnaces (percent) | 75 | 01/01/90 |
| 3. "Small" furnaces (input rate less than 45,000 Btu/hour | (1) | 01/01/92 |
| 4. Boilers (excluding gas steam) (percent) | 80 | 01/01/92 |
| 5. Gas steam boilers (percent) | 75 | 01/01/92 |

[1] Reserved.

(f) *Dishwashers.* Dishwashers must be equipped with an option to dry without heat. The standard was effective on January 1, 1988.

(g) *Clothes washers.* Clothes washers must have an unheated water rinse option. The standard was effective on January 1, 1988.

(h) *Clothes dryers.* Constant burning pilot lights in gas clothes dryers are prohibited. The standard was effective on January 1, 1988.

(i) *Direct heating equipment.*

| Product class | Annual fuel utilization efficiency, Jan. 1, 1990 (percent) |
|---|---|
| 1. Gas wall fan type up to 42,000 Btu/hour | 73 |
| 2. Gas wall fan type over 42,000 Btu/hour | 74 |
| 3. Gas wall gravity type up to 10,000 Btu/hour | 59 |
| 4. Gas wall gravity type over 10,000 Btu/hour up to 12,000 Btu/hour | 60 |
| 5. Gas wall gravity type over 12,000 Btu/hour up to 15,000 Btu/hour | 61 |
| 6. Gas wall gravity type over 15,000 Btu/hour up to 19,000 Btu/hour | 62 |
| 7. Gas wall gravity type over 19,000 Btu/hour up to 27,000 Btu/hour | 63 |
| 8. Gas wall gravity type over 27,000 Btu/hour up to 46,000 Btu/hour | 64 |
| 9. Gas wall gravity type over 46,000 Btu/hour | 65 |
| 10. Gas floor up to 37,000 Btu/hour | 56 |
| 11. Gas floor over 37,000 Btu/hour | 57 |
| 12. Gas room up to 18,000 Btu/hour | 57 |
| 13. Gas room over 18,000 Btu/hour up to 20,000 Btu/hour | 58 |
| 14. Gas room over 20,000 Btu/hour up to 27,000 Btu/hour | 63 |
| 15. Gas room over 27,000 Btu/hour up to 46,000 Btu/hour | 64 |
| 16. Gas room over 46,000 Btu/hour | 65 |

(j) *Kitchen ranges and ovens.* Gas kitchen ranges and ovens with an electrical supply cord shall not be equipped with a constant burning pilot. The standard is effective on January 1, 1990.

(k) *Pool heaters.* The thermal efficiency of pool heaters must be no less than 78%. The standard is effective on January 1, 1990.

(l) *Television sets.* [Reserved]

(m) *Fluorescent lamp ballasts.* (1) Except as provided in paragraph (m)(2) of this section, each fluorescent lamp ballast—

(i)(A) Manufactured on or after January 1, 1990;

(B) Sold by the manufacturer on or after April 1, 1990; or

(C) Incorporated into a luminarie by a luminarie manufacturer on or after April 1, 1991; and

(ii) Designed—

(A) To operate at nominal input voltages of 120 or 277 volts;

(B) To operate with an input current frequency of 60 Hertz; and

(C) For use in connection with F40T12, F96T12, or F96T12HO lamps; shall have a power factor of 0.90 or greater and

shall have a ballast efficacy factor not less than the following:

| Application for operation of | Ballast input voltage | Total nominal lamp watts | Ballast efficacy factor |
|---|---|---|---|
| One F40T12 lamp | 120 | 40 | 1.805 |
| | 277 | 40 | 1.805 |
| Two F40T12 lamps | 120 | 80 | 1.060 |
| | 277 | 80 | 1.050 |
| Two F9T12 lamps | 120 | 150 | 0.570 |
| | 277 | 150 | 0.570 |
| Two F96T12HO lamps | 120 | 220 | 0.390 |
| | 277 | 220 | 0.390 |

(2) The standards described in paragraph (m)(1) of this section do not apply to (i) a ballast which is designed for dimming or for use in ambient temperatures of 0°F or less, or (ii) a ballast which has a power factor of less than 0.90 and is designed for use only in residential building applications.

**§ 430.33 Preemption of state regulations.**

Any state regulation providing for any energy conservation standard, or other requirement with respect to the energy efficiency or energy use, of a covered product that is not identical to a Federal standard in effect under this subpart is preempted by that standard, except as provided for in section 327 (b) and (c) of the Act.

13. Subpart D of Part 430 is revised to read as follows:

## Subpart D—Petitions To Exempt State Regulation From Preemption; Petitions to Withdraw Exemption of State Regulation

Sec.



## Subpart D—[Amended]

**§ 430.40 Purpose and scope.**

(a) The regulations in this subpart prescribe the procedures to be followed in connection with petitions requesting a rule that a State regulation prescribing an energy conservation standard or other requirement respecting energy use or energy efficiency of a type (or class) of covered product not be preempted.

(b) The regulations in this subpart also prescribe the procedures to be followed in connection with petitions to withdraw a rule exempting a State regulation prescribing an energy conservation standard or other requirement respecting energy use or energy efficiency of a type (or class) of covered product.

**§ 430.41 Prescriptions of a rule.**

(a) *Criteria for exemption from preemption.* Upon petition by a State which has prescribed an energy conservation standard or other requirement for a type or class of a covered product for which a Federal energy conservation standard is applicable, the Secretary shall prescribe a rule that such standard not be preempted if he determines that the State has established by a preponderance of the evidence that such requirement is needed to meet unusual and compelling State or local energy interests. For the purposes of this regulation, the term "unusual and compelling State or local energy interests" means interests which are substantially different in nature or magnitude than those prevailing in the U.S. generally; and are such that when evaluated within the context of the State's energy plan and forecast, the costs, benefits, burdens, and reliability of energy savings resulting from the State regulation make such regulation preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to the State regulation. The Secretary may not prescribe such a rule if he finds that interested persons have established, by a preponderance of the evidence, that the State's regulation will significantly burden manufacturing, marketing, distribution, sale or servicing of the covered product on a national basis. In determining whether to make such a finding, the Secretary shall evaluate all relevant factors including: The extent to which the State regulation will increase manufacturing or distribution costs of manufacturers, distributors, and others; the extent to which the State regulation will disadvantage smaller manufacturers, distributors, or dealers or lessen competition in the sale of the covered product in the State; the extent to which the State regulation would cause a burden to manufacturers to redesign and produce the covered product type (or class), taking into consideration the extent to which the regulation would result in a reduction in the current models, or in the projected availability of models, that could be shipped on the effective date of the regulation to the State and within the U.S., or in the current or projected sales volume of the covered product type (or class) in the State and the U.S.; and the extent to which the State regulation is likely to contribute significantly to a proliferation of State appliance efficiency requirements and the cumulative impact such requirements would have. The Secretary may not prescribe such a rule if he finds that such a rule will result in the unavailability in the State of any covered product (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of the Secretary's finding. The failure of some classes (or types) to meet this criterion shall not affect the Secretary's determination of whether to prescribe a rule for other classes (or types).

(1) Requirements of petition for exemption from preemption. A petition from a State for a rule for exemption from preemption shall include the information listed in paragraphs (a)(1)(i) through (a)(1)(viii) of this section. A petition for a rule and correspondence relating to such petition shall be available for public review except for confidential or proprietary information submitted in accordance with the Department of Energy's Freedom of Information Regulations set forth in 10 CFR Part 1004:

(i) The name, address and telephone number of the petitioner;

(ii) A copy of the State standard for which a rule exempting such standard is sought;

(iii) A copy of the State's energy plan and forecast;

(iv) Specification of each type or class of covered product for which a rule exempting a standard is sought;

(v) Other information, if any, believed to be pertinent by the petitioner; and

(vi) Such other information as the Secretary may require.

(b) *Criteria for exemption from preemption when energy emergency conditions exist within State.* Upon petition by a State which has prescribed an energy conservation standard or other requirement for a type or class of a covered product for which a Federal energy conservation standard is applicable, the Secretary may prescribe a rule, effective upon publication in the **Federal Register**, that such regulation not be preempted if he determines that in addition to meeting the requirements of paragraph (a) of this section the State has established that: an energy emergency condition exists within the State that imperils the health, safety and welfare of its residents because of the inability of the State or utilities within the State to provide adequate quantities

of gas or electric energy to its residents at less than prohibitive costs; and cannot be substantially alleviated by the importation of energy or the use of interconnection agreements; and the State regulation is necessary to alleviate substantially such condition.

(1) Requirements of petition for exemption from preemption when energy emergency conditions exist within a State. A petition from a State for a rule for exemption from preemption when energy emergency conditions exist within a State shall include the information listed in paragraphs (a)(1)(i) through (a)(1)(vi) of this section. A petition shall also include the information prescribed in paragraphs (b)(1)(i) through (b)(1)(iv) of this section, and shall be available for public review except for confidential or proprietary information submitted in accordance with the Department of Energy's Freedom of Information Regulations set forth in 10 CFR Part 1004:

(i) A description of the energy emergency condition which exists within the State, including causes and impacts.

(ii) A description of emergency response actions taken by the State and utilities within the State to alleviate the emergency condition;

(iii) An analysis of why the emergency condition cannot be alleviated substantially by importation of energy or the use of interconnection agreements;

(iv) An analysis of how the State standard can alleviate substantially such emergency condition.

(c) *Criteria for withdrawal of a rule exempting a State standard.* Any person subject to a State standard which, by rule, has been exempted from Federal preemption and which prescribes an energy conservation standard or other requirement for a type or class of a covered product, when the Federal energy conservation standard for such product subsequently is amended, may petition the Secretary requesting that the exemption rule be withdrawn. The Secretary shall consider such petition in accordance with the requirements of paragraph (a) of this section, except that the burden shall be on the petitioner to demonstrate that the exemption rule received by the State should be withdrawn as a result of the amendment to the Federal standard. The Secretary shall withdraw such rule if he determines that the petitioner has shown the rule should be withdrawn.

(1) Requirements of petition to withdraw a rule exempting a State standard. A petition for a rule to withdraw a rule exempting a State standard shall include the information prescribed in paragraphs (c)(1)(i) through (c)(1)(vii) of this section, and shall be available for public review, except for confidential or proprietary information submitted in accordance with the Department of Energy's Freedom of Information Regulations set forth in 10 CFR Part 1004:

(i) The name, address and telephone number of the petitioner;

(ii) A statement of the interest of the petitioner for which a rule withdrawing an exemption is sought;

(iii) A copy of the State standard for which a rule withdrawing an exemption is sought;

(iv) Specification of each type or class of covered product for which a rule withdrawing an exemption is sought;

(v) A discussion of the factors contained in paragraph (a) of this section;

(vi) Such other information, if any, believed to be pertinent by the petitioner; and

(vii) Such other information as the Secretary may require.

**§ 430.42 Filing requirements.**

(a) *Service.* All documents required to be served under this subpart shall, if mailed, be served by first class mail. Service upon a person's duly authorized representative shall constitute service upon that person.

(b) *Obligation to supply information.* A person or State submitting a petition is under a continuing obligation to provide any new or newly discovered information relevant to that petition. Such information includes, but is not limited to, information regarding any other petition or request for action subsequently submitted by that person or State.

(c) *The same or related matters.* A person or State submitting a petition or other request for action shall state whether to the best knowledge of that petitioner the same or related issue, act, or transaction has been or presently is being considered or investigated by any State agency, department, or instrumentality.

(d) *Computation of time.* (1) Computing any period of time prescribed by or allowed under this subpart, the day of the action from which the designated period of time begins to run is not to be included. If the last day of the period is Saturday, or Sunday, or Federal legal holiday, the period runs until the end of the next day that is neither a Saturday, or Sunday or Federal legal holiday.

(2) Saturdays, Sundays, and intervening Federal legal holidays shall be excluded from the computation of time when the period of time allowed or prescribed is 7 days or less.

(3) When a submission is required to be made within a prescribed time, DOE may grant an extension of time upon good cause shown.

(4) Documents received after regular business hours are deemed to have been submitted on the next regular business day. Regular business hours for the DOE's National Office, Washington, DC, are 8:30 a.m. to 4:30 p.m.

(5) DOE reserves the right to refuse to accept, and not to consider, untimely submissions.

(e) *Filing of petitions.* (1) A petition for a rule shall be submitted in triplicate to: The Assistant Secretary for Conservation and Renewable Energy, U.S. Department of Energy, Section 327 Petitions, Appliance Efficiency Standards, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585.

(2) A petition may be submitted on behalf of more than one person. A joint petition shall indicate each person participating in the submission. A joint petition shall provide the information required by § 430.41 for each person on whose behalf the petition is submitted.

(3) All petitions shall be signed by the person(s) submitting the petition or by a duly authorized representative. If submitted by a duly authorized representative, the petition shall certify this authorization.

(4) A petition for a rule to withdraw a rule exempting a State regulation, all supporting documents, and all future submissions shall be served on each State agency, department, or instrumentality whose regulation the petitioner seeks to supersede. The petition shall contain a certification of this service which states the name and mailing address of the served parties, and the date of service.

(f) *Acceptance for filing.* (1) Within fifteen (15) days of the receipt of a petition, the Secretary will either accept it for filing or reject it, and the petitioner will be so notified in writing. The Secretary will serve a copy of this notification on each other party served by the petitioner. Only such petitions which conform to the requirements of this subpart and which contain sufficient information for the purposes of a substantive decision will be accepted for filing. Petitions which do not so conform will be rejected and an explanation provided to petitioner in writing.

(2) For purposes of the Act and this subpart, a petition is deemed to be filed on the date it is accepted for filing.

(g) *Docket.* A petition accepted for filing will be assigned an appropriate docket designation. Petitioner shall use the docket designation in all subsequent submissions.

**§ 430.43 Notice of petition.**

(a) Promptly after receipt of a petition and its acceptance for filing, notice of such petition shall be published in the **Federal Register**. The notice shall set forth the availability for public review of all data and information available, and shall solicit comments, data and information with respect to the determination on the petition. Except as may otherwise be specified, the period for public comment shall be 60 days after the notice appears in the **Federal Register**.

(b) In addition to the material required under paragraph (a) of this section, each notice shall contain a summary of the State regulation at issue and the petitioner's reasons for the rule sought.

**§ 430.44 Consolidation.**

DOE may consolidate any or all matters at issue in two or more proceedings docketed where there exist common parties, common questions of fact and law, and where such consolidation would expedite or simplify consideration of the issues. Consolidation shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred.

**§ 430.45 Hearing.**

The Secretary may hold a public hearing, and publish notice in the **Federal Register** of the date and location of the hearing, when he determines that such a hearing is necessary and likely to result in a timely and effective resolution of the issues. A transcript shall be kept of any such hearing.

**§ 430.46 Disposition of petitions.**

(a) After the submission of public comments under § 430.42(a), the Secretary shall prescribe a final rule or deny the petition within 6 months after the date the petition is filed.

(b) The final rule issued by the Secretary or a determination by the Secretary to deny the petition shall include a written statement setting forth his findings and conclusions, and the reasons and basis therefor. A copy of the Secretary's decision shall be sent to the petitioner and the affected State agency. The Secretary shall publish in the **Federal Register** a notice of the final rule granting or denying the petition and the reasons and basis therefor.

(c) If the Secretary finds that he cannot issue a final rule within the 6-month period pursuant to paragraph (a) of this section, he shall publish a notice in the **Federal Register** extending such period to a date certain, but no longer than one year after the date on which the petition was filed. Such notice shall include the reasons for the delay.

**§ 430.47 Effective dates of final rules.**

(a) A final rule exempting a State standard from Federal preemption will be effective:

(1) Upon publication in the **Federal Register** if the Secretary determines that such rule is needed to meet an "energy emergency condition" within the State.

(2) Three years after such rule is published in the **Federal Register**; or

(3) Five years after such rule is published in the **Federal Register** if the Secretary determines that such additional time is necessary due to the burdens of retooling, redesign or distribution.

(b) A final rule withdrawing a rule exempting a State standard will be effective upon publication in the **Federal Register**.

**§ 430.48 Request for reconsideration.**

(a) Any petitioner whose petition for a rule has been denied may request reconsideration within 30 days of denial. The request shall contain a statement of facts and reasons supporting reconsideration and shall be submitted in writing to the Secretary.

(b) The denial of a petition will be reconsidered only where it is alleged and demonstrated that the denial was based on error in law or fact and that evidence of the error is found in the record of the proceedings.

(c) If the Secretary fails to take action on the request for reconsideration within 30 days, the request is deemed denied, and the petitioner may seek such judicial review as may be appropriate and available.

(d) A petitioner has not exhausted other administrative remedies until a request for reconsideration has been filed and acted upon or deemed denied.

**§ 430.49 Finality of decision.**

(a) A decision to prescribe a rule that a State energy conservation standard or other requirement not be preempted is final on the date the rule is issued, i.e., signed by the Secretary. A decision to prescribe such a rule has no effect on other regulations of a covered product of any other State.

(b) A decision to prescribe a rule withdrawing a rule exempting a State standard or other requirement is final on the date the rule is issued, i.e., signed by the Secretary. A decision to deny such a petition is final on the day a denial of a request for reconsideration is issued, i.e., signed by the Secretary.

14. Part 430 is amended by adding new Subpart E, to read as follows:

**Subpart E—Small Business Exemptions**

Sec.



**Subpart E—(Amended)**

**§ 430.50 Purpose and scope.**

(a) This subpart establishes procedures for the submission and disposition of applications filed by manufacturers of covered consumer products with annual gross revenues that do not exceed $8 million to exempt them temporarily from all or part of energy conservation standards established by this part.

(b) The purpose of this subpart is to provide content and format requirements for manufacturers of covered consumer products with low annual gross revenues who desire to apply for temporary exemptions from applicable energy conservation standards.

**§430.51 Eligibility.**

Any manufacturer of a covered product with annual gross revenues that do not exceed $8,000,000 from all its operations (including the manufacture and sale of covered products) for the 12-month period preceding the date of application may apply for an exemption. In determining the annual gross revenues of any manufacturer under this subpart, the annual gross revenue of any other person who controls, is controlled, by, or is under common control with, such manufacturer shall be taken into account.

**§ 430.52 Requirements for applications.**

(a) Each application filed under this subpart shall be submitted in triplicate to: U.S. Department of Energy, Small Business Exemptions, Appliance Efficiency Standards, Assistant Secretary for Conservation and Renewable Energy, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585.

(b) An application shall be in writing and shall include the following:

(1) Name and mailing address of applicant;

(2) Whether the applicant controls, is controlled by, or is under common control with another manufacturer, and

if so, the nature of that control relationship;

(3) The text or substance of the standard or portion thereof for which the exemption is sought and the length of time desired for the exemption;

(4) Information showing the annual gross revenue of the applicant for the preceding 12-month period from all of its operations (including the manufacture and sale of covered products);

(5) Information to show that failure to grant an exemption is likely to result in a lessening of competition;

(6) Such other information, if any, believed to be pertinent by the petitioner; and

(7) Such other information as the Secretary may require.

**§ 430.53 Processing of applications.**

(a) The applicant shall serve a copy of the application, all supporting documents and all subsequent submissions, or a copy from which confidential information has been deleted pursuant to 10 CFR 1004.11, to the Secretary, which may be made available for public review.

(b) Within fifteen (15) days of the receipt of an application, the Secretary will either accept it for filing or reject it, and the applicant will be so notified in writing. Only such applications which conform to the requirements of this subpart and which contain sufficient information for the purposes of a substantive decision will be accepted for filing. Applications which do not so conform will be rejected and an explanation provided to the applicant in writing.

(c) For the purpose of this subpart, an application is deemed to be filed on the date it is accepted for filing.

(d) Promptly after receipt of an application and its acceptance for filing, notice of such application shall be published in the Federal Register. The notice shall set forth the availability for public review of data and information available, and shall solicit comments, data and information with respect to the determination on the application. Except as may otherwise be specified, the period for public comment shall be 60 days after the notice appears in the Federal Register.

(e) The Secretary on his own initiative may convene a hearing if, in his discretion, he considers such hearing will advance his evaluation of the application.

**§ 430.54 Referral to the Attorney General.**

Notice of the application for exemption under this subpart shall be transmitted to the Attorney General by the Secretary and shall contain (a) a statement of the facts and of the reasons for the exemption, and (b) copies of all documents submitted.

**§ 430.55 Evaluation of application.**

The Secretary shall grant an application for exemption submitted under this subpart if the Secretary finds, after obtaining the written views of the Attorney General, that a failure to allow an exemption would likely result in a lessening of competition.

**§ 430.56 Decision and order.**

(a) Upon consideration of the application and other relevant information received or obtained, the Secretary shall issue an order granting or denying the application.

(b) The order shall include a written statement setting forth the relevant facts and the legal basis of the order.

(c) The Secretary shall serve a copy of the order upon the applicant and upon any other person readily identifiable by the Secretary as one who is interested in or aggrieved by such order. The Secretary also shall publish in the Federal Register a notice of the grant or denial of the order and the reason therefor.

**§ 430.57 Duration of temporary exemption.**

A temporary exemption terminates according to its terms but not later than twenty-four months after the affective date of the rule for which the exemption is allowed.

15. Part 430 is amended by adding a new Subpart F to read as follows:

**Subpart F—Certification and Enforcement**

Sec.



**Subpart F—[Amended]**

**§ 430.60 Purpose and scope.**

The regulations in this subpart set forth the procedures to be followed for certification and enforcement testing to determine whether a basic model of a covered product complies with the applicable energy conservation standard set forth in Subpart C of this Part. Energy conservation standards include minimum levels of efficiency and maximum levels of consumption (also referred to as performance standards) and prescriptive energy design requirements (also referred to as design standards).

**§ 430.61 Prohibited acts.**

(a) Each of the following is a prohibited act pursuant to section 332 of the Act:

(1) Failure to permit access to, or copying of records required to be supplied under the Act and this rule or failure to make reports or provide other information required to be supplied under this Act and this rule;

(2) Failure of a manufacturer to supply at his expense a reasonable number of covered products to a test laboratory designated by the Secretary;

(3) Failure of a manufacturer to permit a representative designated by the Secretary to observe any testing required by the Act and this rule and inspect the results of such testing; and

(4) Distribution in commerce by a manufacturer or private labeler of any new covered product which is not in compliance with an applicable energy efficiency standard prescribed under the Act and this rule.

(b) In accordance with section 333 of the Act, any person who knowingly violates any provision of paragraph (a) of this section may be subject to assessment of a civil penalty of no more than $100 for each violation. Each violation of paragraph (a) of this section shall constitute a separate violation with respect to each covered product, and each day of noncompliance with paragraphs (a) (1) through (3) of this section shall constitute a separate violation.

**§ 430.62 Submission of data.**

(a) Compliance statement and certification report. Each manufacturer or private labeler before distributing in commerce any basic model of a covered product subject to the applicable energy conservation standard set forth in Subpart C of this Part shall certify by means of a statement of compliance and certification report, that each basic model meets the requirements of that standard.

(1) The compliance statement shall certify that:

(i) The basic model(s) comply with the applicable energy conservation standards;

(ii) All required testing on which the compliance statement is based was conducted in conformance with the

applicable test requirements prescribed in 10 CFR Part 430 Subpart B and this subpart and all test data are reported in accordance with this subpart;

(iii) All information reported in the compliance statement is true, accurate, and complete; and

(iv) The manufacturer (private labeler) is aware of the penalties associated with violations of the Act and the regulations thereunder, and 18 U.S.C. 1001 which prohibits knowingly making false statements to the Federal Government. The format for a compliance statement is set forth in Appendix A of this subpart.

(2) For each basic model the certification report shall include the annual energy use and adjusted volume (for refrigerators, refrigerator-freezers and freezers), energy factor and rated storage volume (for water heaters), the energy efficiency ratio (for room air conditioners), seasonal energy efficiency ratio and heating seasonal performance factor (for central air conditioners and central air conditioning heat pumps), thermal efficiency (for pool heaters), and annual fuel utilization efficiency (for furnaces and direct heating equipment) the model numbers for each basic model; and its capacity.

(3) Copies of reports to the Federal Trade Commission which include the information in paragraph (a)(2) of this section meet the requirements of this paragraph.

(b) Initial reporting requirements. All data required by paragraph (a) of this section shall be submitted on or before the effective date of the applicable energy conservation standard as prescribed in section 325 of the Act. For each basic model of a covered product to be distributed in commerce, each manufacturer and private labeler or his representative shall file a compliance statement and certification report, by certified mail, to Department of Energy, Appliance Efficiency Standards, Assistant Secretary for Conservation and Renewable Energy, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585.

(c) *New models.* All information required by paragraph (a)(2) of this section must be submitted for new models prior to or concurrent with any distribution of such model. Any change to a basic model which affects energy consumption may constitute the addition of a new basic model subject to the requirements of § 430.61 of this part. If such change does not alter compliance with the applicable energy conservation standard for the basic model, the new model shall be considered certified. Models which are discontinued shall be reported, in writing, to the Department of Energy.

(d) *Maintenance of records.* (1) The manufacturer of any covered product subject to any of the energy performance standards or procedures prescribed in this part, shall establish, maintain, and retain the records of the underlying test data for all certification testing. Such records shall be organized and indexed in a fashion which makes them readily accessible for review. The records should include the supporting test data associated with tests performed on any test units to satisfy the requirements of this subpart (except tests performed by DOE directly).

(2) All such records shall be retained by the manufacturer for a period of two years from the date that production of the applicable model has ceased. Records shall be retained in a form allowing ready access to DOE upon request.

(e) *Third party representation.* If a manufacturer or private labeler elects to use a third party, e.g., trade association or other authorized representative, to submit the certification report, the certification report shall include all the information identified in paragraph (a) of this section, including the compliance statement.

**§ 430.63 Sampling.**

(a) For purposes of a certification of compliance, the determination that a basic model complies with the applicable energy performance standard shall be based upon the sampling procedures set forth in § 430.23 of this Part. For purposes of a certification of compliance, the determination that a basic model complies with the applicable design standard shall be based upon the incorporation of specific design requirements for clothes dryers, dishwashers, clothes washers and kitchen ranges and ovens specified in section 325 of the Act.

(b) A basic model which meets the following requirements may qualify as an "other than tested model" for purposes of the certification testing and sampling requirements:

(1) Central air conditioners: The condenser-evaporator coil combinations manufactured by the condensing unit manufacturer other than the combination likely to have the largest volume of retail sales or the condenser-coil combinations manufactured in part by a component manufacturer using the same condensing unit.

(2) For purposes of certification of "other than tested models," as defined in paragraph (b)(1) of this section, a manufacturer may certify the basic model on the basis of computer simulation or engineering analysis as set forth in § 430.23(m) of this Part.

**§ 430.64 Imported products.**

(a) Pursuant to section 331 of the Act, any person importing any covered product into the United States shall comply with the provisions of the Act and of this Part, and is subject to the remedies of this Part.

(b) Any covered product offered for importation in violation of the Act and of this Part shall be refused admission into the customs territory of the United States under rules issued by the Secretary of the Treasury, except that the Secretary of the Treasury may, by such rules, authorize the importation of such covered product upon such terms and conditions (including the furnishing of a bond) as may appear to the Secretary of Treasury appropriate to ensure that such covered product will not violate the Act and this Part, or will be exported or abandoned to the United States.

**§ 430.65 Exported products.**

Pursuant to section 330 of the Act, this part shall not apply to any covered product if (a) such covered product is manufactured, sold, or held for sale for export from the United States (or such product was imported for export), unless such product is, in fact, distributed in commerce for use in the United States, and (b) such covered product, when distributed in commerce, or any container in which it is enclosed when so distributed, bears a stamp or label stating that such covered product is intended for export.

**§ 430.70 Enforcement.**

(a) *Performance standard*—(1) *Test notice.* Upon receiving information in writing, concerning the energy performance of a particular covered product sold by a particular manufacturer or private labeler which indicates that the covered product may not be in compliance with the applicable energy performance standard, the Secretary may conduct testing of that covered product under this subpart by means of a test notice addressed to the manufacturer in accordance with the following requirements:

(i) Such a procedure will only be followed after the Secretary or his designated representative has examined the underlying test data provided by the manufacturer and after the manufacturer has been offered the opportunity to meet with DOE to verify compliance with the applicable performance standard. A representative designated by the Secretary shall be

permitted to observe any reverification procedures by this subpart, and to inspect the results of such reverification.

(ii) The test notice will be signed by the Secretary or his designee. The test notice will be mailed or delivered by DOE to the plant manager or other responsible official, as designated by the manufacturer.

(iii) The test notice will specify the model or basic model to be selected for testing, the method of selecting the test sample, the time at which testing shall be initiated, the date by which testing is scheduled to be completed and the facility at which testing will be conducted. The test notice may also provide for situations in which the selected basic model is unavailable for testing, and may include alternative basic models.

(iv) The Secretary may require in the test notice that the manufacturer of a covered product shall ship at his expense a reasonable number of units of a basic model specified in such test notice to a testing laboratory designated by the Secretary. The number of units of a basic model specified in a test notice shall not exceed twenty (20).

(v) Within 5 working days of the time units are selected, the manufacturer shall ship the specified test units of a basic model to the testing laboratory.

(2) *Testing Laboratory.* Whenever DOE conducts enforcement testing at a designated laboratory in accordance with a test notice under this section, the resulting test data shall constitute official test data for that basic model. Such test data will be used by DOE to make a determination of compliance or noncompliance if a sufficient number of tests have been conducted to satisfy the requirements of Appendix B of this subpart.

(3) *Sampling.* The determination that a manufacturer's basic model complies with the applicable energy performance standard shall be based on the testing conducted in accordance with the statistical sampling procedures set forth in Appendix B of this subpart and the test procedures set forth in Subpart B of this Part.

(4) *Test unit selection.* A DOE inspector shall select a batch, a batch sample, and test units from the batch sample in accordance with the provisions of this paragraph and the conditions specified in the test notice.

(i) The batch may be subdivided by DOE utilizing criteria specified in the test notice, e.g., date of manufacture, component-supplier, location of manufacturing facility, or other criteria which may differentiate one unit from another within a basic model.

(ii) A batch sample of up to 20 units will then be randomly selected from one or more subdivided groups within the batch. The manufacturer shall keep on hand all units in the batch sample until such time as the basic model is determined to be in compliance or noncompliance.

(iii) Individual test units comprising the test sample shall be randomly selected from the batch sample.

(iv) All random selection shall be achieved by sequentially numbering all of the units in a batch sample and then using a table of random numbers to select the units to be tested.

(5) *Test unit preparation.* (i) Prior to and during testing, a test unit selected in accordance with paragraph (a)(4) of this section shall not be prepared, modified, or adjusted in any manner unless such preparation, modification, or adjustment is allowed by the applicable DOE test procedure. One test shall be conducted for each test unit in accordance with the applicable test procedures prescribed in Subpart B.

(ii) No quality control, testing or assembly procedures shall be performed on a test unit, or any parts and subassemblies thereof, that is not performed during the production and assembly of all other units included in the basic model.

(iii) A test unit shall be considered defective if such unit is inoperative or is found to be in noncompliance due to failure of the unit to operate according to the manufacturer's design and operating instructions. Defective units, including those damaged due to shipping or handling, shall be reported immediately to DOE. DOE shall authorize testing of an additional unit on a case-by-case basis.

(6) *Testing at manufacturer's option.* (i) If a manufacturer's basic model is determined to be in noncompliance with the applicable energy performance standard at the conclusion of DOE testing in accordance with the double sampling plan specified in Appendix B of this subpart, the manufacturer may request that DOE conduct additional testing of the model according to procedures set forth in Appendix B of this subpart.

(ii) All units tested under paragraph (a)(6) of this section shall be selected and tested in accordance with the provisions given in paragraphs (a) (1) through (5) of this section.

(iii) The manufacturer shall bear the cost of all testing conducted under paragraph (a)(6) of this section.

(iv) The manufacturer shall cease distribution of the basic model being tested under the provisions of paragraph (a)(6) of this section from the time the manufacturer elects to exercise the option provided in this paragraph until the basic model is determined to be in compliance. DOE may seek civil penalties for all units distributed during such period.

(v) If the additional testing results in a determination of compliance, a notice of allowance to resume distribution shall be issued by the Department.

(b) *Design standard.* In the case of a design standard, a model is determined noncompliant by DOE after the Secretary or his designated representative has examined the underlying design information provided by the manufacturer and after the manufacturer has been offered the opportunity to verify compliance with the applicable design standard.

**§ 430.71 Cessation of distribution of a basic model.**

(a) In the event that a model is determined noncompliant by DOE in accordance with § 430.70 of this Part or if a manufacturer or private labeler determines a model to be in noncompliance, then the manufacturer or private labeler shall:

(1) Immediately cease distribution in commerce of the basic model;

(2) Give immediate written notification of the determination of noncompliance, to all persons to whom the manufacturer has distributed units of the basic model manufactured since the date of the last determination of compliance.

(3) Pursuant to a request made by the Secretary, provide DOE within 30 days of the request, records, reports and other documentation pertaining to the acquisition, ordering, storage, shipment, or sale of a basic model determined to be in noncompliance.

4. The manufacturer may modify the noncompliant basic model in such manner as to make it comply with the applicable performance standard. Such modified basic model shall then be treated as a new basic model and must be certified in accordance with the provisions of this subpart; except that in addition satisfying all requirements of this subpart, the manufacturer shall also maintain records that demonstrate that modifications have been made to all units of the new basic model prior to distribution in commerce.

(b) If a basic model is not properly certified in accordance with the requirements of this subpart, the Secretary may seek, among other remedies, injunctive action to prohibit distribution in commerce of such basic model.

**§ 430.72 Subpoena.**

Pursuant to section 329(a) of the Act, for purposes of carrying out this part, the Secretary or the Secretary's designee, may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, records, papers, and other documents, and administer the oaths. Witnesses summoned under the provisions of th is section shall be paid the same fees and mileage as are paid to witnesses in the courts of the United States. In case of contumacy by, or refusal to obey a subpoena served, upon any persons subject to this Part, the Secretary may seek an order from the District Court of the United States for any District in which such person is found or resides or transacts business requiring such person to appear and give testimony, or to appear and produce documents. Failure to obey such order is punishable by such court as a contempt thereof.

**§ 430.73 Remedies.**

If DOE determines that a basic model of a covered product does not comply with an applicable energy conservation standard:

(a) DOE will notify the manufacturer, private labeler or any other person as required, of this finding and of the Secretary's intent to seek a judicial order restraining further distribution in commerce of such basic model unless the manufacturer, private labeler or any other person as required, delivers to DOE within 15 calendar days a statement, satisfactory to DOE, of the steps he will take to insure that the noncompliant model will no longer be distributed in commerce. DOE will monitor the implementation of such statement.

(b) If the manufacturer, private labeler or any other person as required, fails to stop distribution of the noncompliant model, the Secretary may seek to restrain such violation in accordance with section 334 of the Act.

(c) The Secretary shall determine whether the facts of the case warrant the assessment of civil penalties for knowing violations in accordance with section 333 of the Act.

**§ 430.74 Hearings and appeals.**

(a) Pursuant to section 333(d) of the Act, before issuing an order assessing a civil penalty against any person under this section, the Secretary shall provide to such person notice of the proposed penalty. Such notice shall inform such person of that person's opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures of paragraph (c) of this section (in lieu of those in paragraph (b) of this section) apply with respect to such assessment.

(b)(1) Unless an election is made within 30 calendar days after receipt of notice under paragraph (a) of this section to have paragraph (c) of this section apply with respect to such penalty, the Secretary shall assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of Title 5, United States Code, before an administrative law judge appointed under section 3105 of such Title 5. Such assessment order shall include the administrative law judge's findings and the basis for such assessment.

(2) Any person against whom a penalty is assessed under this section may, within 60 calendar days after the date of the order of the Secretary assessing such penalty, institute an action in the United States Court of Appeals for the appropriate judicial circuit for judicial review of such order in accordance with Chapter 7 of Title 5, United States Code. The court shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in part, the order of the Secretary, or the court may remand the proceeding to the Secretary for such further action as the court may direct.

(c)(1) In the case of any civil penalty with respect to which the procedures of this section have been elected, the Secretary shall promptly assess such penalty, by order, after the date of the receipt of the notice under paragraph (a) of this section of the proposed penalty.

(2) If the civil penalty has not been paid within 60 calendar days after the assessment has been made under paragraph (c)(1) of this section, the Secretary shall institute an action in the appropriate District Court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.

(3) Any election to have this paragraph apply may not be revoked except with the consent of the Secretary.

(d) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order under paragraph (b) of this section, or after the appropriate District Court has entered final judgment in favor of the Secretary under paragraph (c) of this section, the Secretary shall institute an action to recover the amount of such penalty in any appropriate District Court of the United States. In such action, the validity and appropriateness of such final assessment order or judgment shall not be subject to review.

(e)(1) In accordance with the provisions of section 333(d)(5)(A) of the Act and notwithstanding the provisions of title 28, United States Code, or section 502(c) of the Department of Energy Organization Act, the Secretary shall be represented by the General Counsel of the Department of Energy (or any attorney or attorneys within DOE designated by the Secretary) who shall supervise, conduct, and argue any civil litigation to which paragraph (c) of this section applies including any related collection action under paragraph (d) of this section in a court of the United States or in any other court, except the Supreme Court of the United States. However, the Secretary or the General Counsel shall consult with the Attorney General concerning such litigation and the Attorney General shall provide, on request, such assistance in the conduct of such litigation as may be appropriate.

(2) In accordance with the provisions of section 333(d)(5)(B) of the Act, and subject to the provisions of section 502(c) of the Department of Energy Organization Act, the Secretary shall be represented by the Attorney General, or the Solicitor General, as appropriate, in actions under this section, except to the extent provided in paragraph (e)(1) of this section.

(3) In accordance with the provisions of section 333(d)(5)(C) of the Act, section 402(d) of the Department of Energy Organization Act shall not apply with respect to the function of the Secretary under this section.

**§ 430.75 Confidentiality.**

Pursuant to the provisions of 10 CFR 1004.11, any person submitting information or data which the person believes to be confidential and exempt law from public disclosure should submit one complete copy, and fifteen copies from which the information believed to be confidential has been deleted. In accordance with the procedures established at 10 CFR 1004.11, DOE shall make its own determination with regard to any claim that information submitted be exempt from public disclosure.

OMB Control No. 1910–1400

**Appendix A to Subpart F Compliance Statement**

Statement of Compliance With Energy Conservation Standards for Appliances

Product: _____

Manufacturer's Name and Address

Date: _____

*Submit by Certified Mail to:* Department of Energy, Appliance Efficiency Standards, Assistant Secretary for Conservation and Renewable Energy, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585.

This report is submitted pursuant to Part 430 (Energy Conservation Program for Consumer Products) of the Energy Policy and Conservation Act (Pub. L. 94–163), and amendments thereto. The basic model(s) included in this report complies (comply) with the applicable energy conservation standard. All testing where appropriate, on which this certification report is based, was conducted in conformance with the applicable test requirements prescribed in Subpart B of 10 CFR Part 430. All information reported in this certification report is true, accurate, and complete. I am aware of the penalties associated with violations of the Act and the regulations thereunder, and am also aware of the provisions contained in 18 U.S.C. 1001, which prohibits knowingly making false statements to the Federal Government.

Name of Person to Contact for Further Information:
Name: _____
Address: _____
Telephone No.: _____

If the model specific information accompanying this statement of compliance was prepared by a third party organization under the provisions of § 430.62 of 10 CFR Part 430, the individual (manufacturer) authorizing third party representations:
Signature: _____
Name: _____
Address: _____
Telephone No.: _____

## Appendix B to Subpart F of Part 430—SAmpling Plan for Enforcement Testing

**Double Sampling**

Step 1. The first sample size ($n_1$) must be four or more units.

Step 2. Compute the mean ($\bar{x}_1$) of the measured energy performance of the $n_1$ units in the first sample as follows:

$$\bar{x}_1 = \frac{1}{n_1}\left(\sum_{i=1}^{n_1} x_i\right) \qquad (1)$$

where $x_i$ is the measured energy efficiency or energy consumption of unit i.

Step 3. Compute the standard deviation ($s_1$) of the measured energy performance of the $n_1$ units in the first sample as follows:

$$s_1 = \sqrt{\frac{\sum_{i=1}^{n_1} (x_i - \bar{x}_1)^2}{n_1 - 1}} \qquad (2)$$

Step 4. Compute the standard error ($s_{\bar{x}_1}$) of the measured energy performance of the $n_1$ units in the first sample as follows:

$$s_{\bar{x}_1} = \frac{s_1}{\sqrt{n_1}} \qquad (3)$$

Step 5. Compute the upper control limit ($UCL_1$) and lower control limit ($LCL_1$) for the mean of the first sample using the applicable DOE energy performance standard (EPS) as the desired mean and a probability level of 95 percent (two-tailed test) as follows:

$$LCL_1 = EPS - ts_{\bar{x}_1} \quad (4)$$

$$UCL_1 = EPS + ts_{\bar{x}_1} \quad (5)$$

where t is a statistic based on a 95 percent two-tailed probability level and a sample size of $n_1$.

Step 6A. For an Energy Efficiency Standard, compare the mean of the first sample ($\bar{x}_1$) with the upper and lower control limits ($UCL_1$ and $LCL_1$) to determine one of the following:

(i) If the mean of the first sample is below the lower control limit, then the basic model is in noncompliance and testing is at an end. (Do not go on to any of the steps below.)

(ii) If the mean of the first sample is equal to or greater than the upper control limit, then the basic model is in compliance and testing is at an end. (Do not go on to any of the steps below.)

(iii) If the sample mean is equal to or greater than the lower control limit but less than the upper control limit, then no determination of compliance or noncompliance can be made and a second sample size is determined by Step 7a.

Step 6b. For an Energy Consumption Standard, compare the mean of the first sample ($\bar{x}_1$) with the upper and lower control limits ($UCL_1$ and $LCL_1$) to determine one of the following:

(i) If the mean of the first sample is above the upper control limit, then the basic model is in noncompliance and testing is at an end. (Do not go on to any of the steps below.)

(ii) If the mean of the first sample is equal to or less than the lower control limit, then the basic model is in compliance and testing is at an end. (Do not go on to any of the steps below.)

(iii) If the sample mean is equal to or less than the upper control limit but greater than the lower control limit, then no determination of compliance or noncompliance can be made and a second sample size is determined by Step 7b.

Step 7a. For an Energy Efficiency Standard, determine the second sample size ($n_2$) as follows:

$$n_2 = \left( \frac{t \; s_1}{0.05 \; EPA} \right)^2 - n_1 \quad (6a)$$

where $s_1$ and t have the values used in Steps 4 and 5, respectively. The term "0.05 EPS" is the difference between the applicable energy efficiency standard and 95 percent of the standard, where 95 percent of the standard is taken as the lower control limit. This procedure yields a sufficient combined sample size ($n_1+n_2$) to give an estimated 97.5 percent probability of obtaining a determination of compliance when the true mean efficiency is equal to the applicable standard.

Given the solution value of $n_2$, determine one of the following:

(1) If the value of $n_2$ is less than or equal to zero *and* if the mean energy efficiency of the first sample ($\bar{x}_1$) is either equal to or greater than the lower control limit ($LCL_1$) or equal to or greater than 95 percent of the applicable energy efficiency standard (EES), whichever is greater, i.e., if

$n_2 \leq 0$ *and* $\bar{x}_1 \geq \max\{LCL_1, 0.95\ EES\}$,

the basic model is in compliance and testing is at an end.

(2) If the value of $n_2$ is less than or equal to zero *and* the mean energy efficiency of the first sample ($\bar{x}_1$) is less than the lower control limit ($LCL_1$) or less than 95 percent of the applicable energy efficiency standard (EES), whichever is greater, i.e., if

$n_2 \leq 0$ *and* $\bar{x}_1 < \max\{LCL_1, 0.95\ EES\}$,

the basic model is in noncompliance and testing is at an end.

(3) If the value of $n_2$ is greater than zero, then value of the second sample size is determined to be the smallest integer equal to or greater than the solution value of $n_2$ for equation (6a). If the value of $n_2$ so calculated is greater than $20-n_1$, set $n_2$ equal to $20-n_1$.

Step 7b. For an Energy Consumption Standard, determine the second sample size ($n_2$) as follows:

$$n_2 = \left( \frac{t \; s_1}{0.05 \; EPA} \right)^2 - n_1 \quad (6b)$$

where $s_1$ and t have the values used in Steps 4 and 5, respectively. The term "0.05 EPS" is the difference between the applicable energy consumption standard and 105 percent of the standard, where 105 percent of the standard is taken as the upper control limit. This procedure yields a sufficient combined sample size ($n_1 + n_2$) to give an estimated 97.5 percent probability of obtaining a determination of compliance when the true mean consumption is equal to the applicable standard.

Given the solution value of $n_2$, determine one of the following:

(1) If the value of $n_2$ is less than or equal to zero *and* if the mean energy consumption of the first sample ($\bar{x}_1$) is either equal to or less than the upper control limit ($UCL_1$) or equal to or less than 105 percent of the applicable energy performance standard (EPS), whichever is less, i.e., if

$n_2 \leq 0$ *and* $\bar{x}_1 \leq \min\{UCL_1, 1.05\ EPS\}$,

the basic model is in compliance and testing is at an end.

(2) If the value of $n_2$ is less than or equal to zero *and* the mean energy consumption of the first sample ($\bar{x}_1$) is greater than the upper control limit ($UCL_1$) or more than 105 percent of the applicable energy performance standard (EPS), whichever is less, i.e., if

$n_2 \leq 0$ *and* $\bar{x}_1 > \lesseqgtr \min\{LCL_1, 1.05\ EPS\}$,

the basic model is in noncompliance and testing is at an end.

(3) If the value of $n_2$ is greater than zero, then the value of the second sample size is determined to be the smallest integer equal to or greater than the solution value of $n_2$ for equation (6b). If the value of $n_2$ so calculated is greater than $20-n_1$, set $n_2$ equal to $20-n_1$.

Step 8. Compute the combined mean ($\bar{x}_2$) of the measured energy performance of the $n_1$ and $n_2$ units of the combined first and second samples as follows:

$$\bar{x}_2 = \frac{1}{n_1 + n_2} \left( \sum_{i=1}^{n_1 + n_2} x_1 \right) \quad (7)$$

Step 9. Compute the standard error ($s_{\bar{x}2}$) of the measured energy performance of the $n_1$ and $n_2$ units in the combined first and second samples as follows:

$$s_{\bar{x}_2} = \frac{s_1}{\sqrt{n_1 + n_2}} \quad (8)$$

Note.—$s_1$ is the value obtained in Step 3.

Step 10a. For an Energy Efficiency Standard, compute the lower control limit ($LCL_2$) for the mean of the combined first and second samples using the DOE energy efficiency standard (EES) as the desired mean and a one-tailed probability level of 97.5 percent (equivalent to the two-tailed probability level of 95 percent used in Step 5, above) as follows:

$$LCL_2 = EES - t\, s_{\bar{x}_2} \quad (9a)$$

where the t-statistic has the value obtained in Step 5 above.

Step 10b. For an Energy Consumption Standard, compute the upper control limit ($UCL_2$) for the mean of the combined first and second samples using the DOE energy performance standard (EPS) as the desired mean and a one-tailed probability level of 102.5 percent (equivalent to the two-tailed probability level of 95 percent used in Step 5, above) as follows:

$$UCL_2 = EPS + t\, s_{\bar{x}_2} \quad (9b)$$

where the t-statistic has the value obtained in Step 5 above.

Step 11a. For an Energy Efficiency Standard, compare the combined sample mean ($\bar{x}_2$) to the lower control limit ($LCL_2$) to find one of the following:

(i) If the mean of the combined sample ($\bar{x}_2$) is less than the lower control limit ($LCL_2$) or 95 percent of the applicable energy efficiency standard (EES), whichever is greater, i.e., if

$\bar{x}_2 < \max(LCL_2, 0.95\ EES)$,

the basic model is in noncompliance and testing is at an end.

(ii) If the mean of the combined sample ($\bar{x}_2$) is equal to or greater than the lower control limit ($LCL_2$) or 95 percent of the applicable energy efficiency standard (EES), whichever is greater, i.e., if

$\bar{x}_2 \geqq \max(LCL_2, 0.95\ EES)$,

the basic model is in compliance and testing is at an end.

Step 11b. For an Energy Consumption Standard, compare the combined sample mean ($\bar{x}_2$) to the upper control limit ($UCL_2$) to find one of the following:

(i) If the mean of the combined sample ($\bar{x}_2$) is greater than the upper control limit ($UCL_2$) or 105 percent of the applicable energy performance standard (EPS), whichever is less, i.e., if

$\bar{x}_2 > \min(UCL_2, 1.05\ EPS)$,

the basic model is in noncompliance and testing is at an end.

(ii) If the mean of the combined sample ($\bar{x}_2$) is equal to or less than the upper control limit ($UCL_2$) or 105 percent of the applicable energy performance standard (EPS), whichever is less, i.e., if

$\bar{x}_2 \leqq \min(UCL_2, 1.05\ EPS)$,

the basic model is in compliance and testing is at an end.

*Manufacturer-Option Testing*

If a determination of non-compliance is made in Steps 6, 7 or 11, above, the manufacturer may request that additional testing be conducted, in accordance with the following procedures.

Step A. The manufacturer requests that an additional number, $n_3$, of units be tested, with $n_3$ chosen such that $n_1 + n_2 + n_3$ does not exceed 20.

Step B. Compute the mean energy performance, standard error, and lower or upper control limit of the new combined sample in accordance with the procedures prescribed in Steps 8, 9, and 10, above.

Step C. Compare the mean performance of the new combined sample to the revised lower or upper control limit to determine one of the following:

a.1. For an Energy Efficiency Standard, if the new combined sample mean is equal to or greater than the lower control limit or 95 percent of the applicable energy efficiency standard, whichever is greater, the basic model is in compliance and testing is at an end.

a.2. For an Energy Consumption Standard, if the new combined sample mean is equal to or less than the upper control limit or 105 percent of the applicable energy consumption standard, whichever is less, the basic model is in compliance and testing is at an end.

b.1. For an Energy Efficiency Standard, if the new combined sample mean is less than the lower control limit or 95 percent of the applicable energy efficiency standard, whichever, is greater, and the value of $n_1 + n_2 + n_3$ is less than 20, the manufacturer may request that additional units be tested. The total of all units tested may not exceed 20. Steps A, B, and C are then repeated.

b.2. For an Energy Consumption Standard, if the new combined sample mean is greater than the upper control limit or 105 percent of the applicable energy consumption standard, whichever is less, and the value of $n_1 + n_2 + n_3$ is less than 20, the manufacturer may request that additional units be tested. The total of all units tested may not exceed 20. Steps A, B, and C are then repeated.

c. Otherwise, the basic model is determined to be in noncompliance.

[FR Doc. 89-2716 Filed 2-6-89; 8:45 am]

BILLING CODE 6450-01-M